Supreme Court, U.S.
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No. 92-

IN THE

Supreme Court of the United States

October Term, 1991

CONDADO PLAZA HOTEL & CASINO,

Petitioner,

against

ASOCIACION DE EMPLEADOS DE CASINO DE PUERTO RICO, CONCILIATION AND ARBITRATION BUREAU ARBITRATOR JUAN T. RODRIGUEZ,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

PETITION FOR CERTIORARI

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(8074—LC6-315—1992)

The Questions Presented

1. Whether the appropriate standard of review is the doctrine of deference to an Arbitrator's award when it fails to draw its essence from the collective bargaining agreement where a conflict of United States First versus Fifth and Fourteenth Amendment rights is the Crux of the Controversy and the Award must be rendered in conformity to law as a mutual condition reached by the parties to the finality of the award.

2. Whether a false, defamatory statement by an employee under the guise of an opinion is constitutionally protected speech if the forum is a Legislative Assembly when he intends and petitions for damages to the reputation and business of its employer.

3. Whether an employer can justifiably discharge a disloyal employee that causes real damages to the service, business or product of the employer under prevalent labor and case law.

List of Parties Under Rule 28.1

Condado Plaza Hotel & casino is a four star hotel owned by Posadas de Puerto Rico Associates, Inc., a public corporation organized under the laws of Delaware.

WMS, Inc., a Delaware public corporation, is one of the parent companies of Posadas, through a wholly owned subsidiary, Williams Hotel Corp., also a Delaware public corporation. The latter owns 92.5% interest in Posadas de Puerto Rico Associates, Inc. and also:

50% interest in Posadas de San Juan Associates, a partnership organized under New York limited partnership law doing business as El San Juan Hotel & Casino, through E.S.J. Hotel Corp., a wholly owned subsidiary of WMS, Inc.;

55% interest in a subsidiary Delaware public corporation, Williams Hospitality Management Corporation, that manages both properties, as well as Palmas del Mar Inn & Casino, and;

46.54% interest in WKA Elcon Associates that owns 50% of El Conquistador, LP, both partnerships recently organized under the laws of the state of New York, scheduled to commence operations in late 1992 or early 1993 as El Conquistador Hotel & Casino. KG Caribbean, Inc. owns the remaining 50% of El Conquistador, LP.

The remaining 7.5% interest in Posadas de Puerto Rico Associates, Inc. is held by the following parties:

5% by Hugh A. Andrews, President of Williams Hospitality,

2.5% by Burton I. Koffman, as Nominee of the Koffman family.

The Koffmans are private stockholders of Cenkoff, Inc., a New York corporation. They also hold:

40% interest in Posadas de San Juan Associates through a 25% interest in a private corporation, Midwest Property Corp.

which is a wholly owned subsidiary of K & C Holding Corp. and a 15% in Milt K. Associates, all organized under the laws of the State of New York,

38% interest in Williams Hospitality Management Corporation,

37.23% interest in WKA Elcon Associates that owns 50% of the Elcon, LP.

On his part, Hugh A. Andrews owns a 10% interest in Posadas de San Juan Associates through IHS Associates, Ltd. , a Delaware wholly owned corporation. In addition, he holds a 7% interest in Williams Hospitality Management Corporation; and a 16.23% in the WKA Elcon Associates that owns 50% of Elcon, LP.

The Bureau is a division of the Puerto Rico Department of Labor, a government agency. Juan T. Rodriguez is an Arbitrator and Assistant Director of the Bureau.

Asociacion de Empleados de casino is a Union representing Condado Plaza casino employees.

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No. 92-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

CONDADO PLAZA HOTEL & CASINO,

Petitioner,

v.

ASOCIACION DE EMPLEADOS DE CASINO DE PUERTO RICO CONCILIATION AND ARBITRATION BUREAU, and ARBITRATOR JUAN T. RODRIGUEZ,

Respondent.

ON CERTIORARI FROM THE SUPREME COURT OF PUERTO RICO

PETITION FOR CERTIORARI

Condado Plaza Hotel & Casino[1] the Petitioner, respectfully prays that a writ of certiorari be issued to review a final Ruling of the Supreme Court of Puerto Rico dated February 21, 1992 and entered on February 24, 1992 [App. (iii), p. 44] denying the rehearing of its January 17, 1992 Judgment [App. (i), p. 1] issued under Rule 50 of the Rules of the Supreme Court of Puerto Rico, 4 L.P.R.A. Ap. IA, Rule 50.

Opinion Below

The Puerto Rico Supreme Court Judgment at bar affirms a judgment issued in Case No. KAC 91-0543 by Superior Court Judge, Angel F. Rossy, on September 25, 1991 [App. (ii)A, p. 9] affirming the Award rendered in Case A-2270 [App. (ii)B, p. 19] on March 8, 1991 by Arbitrator Rodríguez on the merits of the dismissal that another Superior Court judgment enjoined him from entertaining in a companion case that is also object of a separate Petition for Certiorari before this Court. The Court below summarily affirmed the Superior Court Judgment and Award relying only on the Petition for Review filed under the authority of the cited Rule 50 of its Rules without addressing the substantial First, Fifth, and Fourteenth Amendment rights invoked under the United States Constitution.

[1]This is the trade name under which Posadas de Puerto Rico Associates, Inc., does lodging and entertainment business in Puerto Rico. From hereon Petitioner will be referred to as Condado Plaza.

The Puerto Rico Supreme Court Judgment is not officially reported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1258, which provides that final decrees or judgments from the Supreme Court of Puerto Rico are reviewable by writ of certiorari, where the validity of a statute of the Commonwealth is drawn in question on the ground of its being repugnant to the United States Constitution and federal laws and the decision is in favor of its validity; or where a right or privilege is claimed under the U.S. Constitution and laws. *US Constitution, Art. III, Sec. 3.*

Review should be undertaken by this Supreme Court as the Supremacy Clause of the Constitution binds "the Judges in every state, . . . anything in the Constitution or Laws of any State to the contrary notwithstanding," to maintain the supreme law of the land within a single, uniform meaning which the judiciary is bound to respect and enforce. U.S. Constitution, Art. VI, cl 2; *Marbury v. Madison*, 1 Cranch 137 (1803); *Cohens v. Virginia*, 6 Wheat 264 (1821). Since *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922), this Court held that the guaranties of certain fundamental rights declared in the Constitution, as are the deprivation of life, liberty or property without due process of law, had full application in Puerto Rico.[2] This Court has furthermore established that a uniform body of federal labor law is applicable to all states, which includes Puerto Rico. *Textile Workers Union v. Lincoln Mills*, 353 US 448 (1957).

The Time Factors Upon Which Jurisdiction Rests Were Met.

Finality, under 28 U.S.C. § 1258 arises when a decision precludes further adjudication in the Supreme Court of Puerto Rico.

The January 17, 1991 Judgment in Case CE 91-690 became final upon the denial of rehearing entered on February 24, 1992. This petition is being docketed within the enlargement of time granted by this Court upon an application timely filed within 90 days from the denial of rehearing of the Judgment below.

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[2]*Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); *Calero Toledo v. Pearson Yatch Leasing Co.*, 416 U.S. 663 (1974); *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970).

There Is A Justiciable Live Controversy Before This Court.

The issues at bar are likely to arise in cases where, like here, the Petitioner is engaged in interstate commerce and is unquestionably covered by the Labor Management Relations Act, 29 U. S. C. § 141 *et seq.*; or where substantial individual rights protected by the United States Constitution are in controversy. The issues are capable of repetition because the only free arbitration services provided in Puerto Rico are those provided by the Bureau, traditionally identified with the worker, in conflict with federal labor law that provides independent services.

Puerto Rico labor law, as argued further in the companion case Petition, conflicts with federal law because an employer in an industry engaged in interstate commerce in Puerto Rico has not been awarded the same standing and protection as the applicable federal law extends when substantial constitutional rights are violated. *Lincoln Mills, supra*. The "capable of repetition, yet evading review" doctrine is appropriate to issue review.[3] The underlying live question persists, *Carroll v. Princess Ann*, 393 US 175, 179 (1968).

No Adequate State Grounds Bar Review.

United States and Puerto Rico Constitution rights were the basis for the review petitioned below as well as the conflict between state and federal labor law, which is a federal question. The judgment at bar relying in the interpretation of a local statute that incorporated reference to expressions made by an employee in the Legislative Assembly as an exclusion of just cause for his dismissal AFTER this particular employee had been discharged when the then prevalent text of Act 80 of May 30, 1976, 29 LPRA §185b *et seq*. did not proscribe such a discharge is not an adequate non-federal ground to validly bar review because it departs from federal constitutional law. *United Air Lines v. Mahin*, 410 US 623, 630-31 (1973). Even when the state court fails to pass upon the federal claim, as it did, the lack of jurisdiction is not conclusive when substantial federal constitutional

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[3]*Storer v. Brown*, 415 US 724, 737 (1974) ; *Richmond Newspapers, Inc. v. Virginia*, 448 US 555 (1980); *Gannett Co., Inc. v. DePascuale*, 443 US 368 (1979); *Nebraska Press Ass'n v. Stuart*, 427 US 539 (1976); *Sosna v. Iowa*, 419 US 393 (1974); *Super Tire Engineering Co. v. McCorkle*, 416 US 115 (1974); *Rosario v. Rockefeller*, 410 US 752 (1973); *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 US 498 (1911).

rights are in controversy and a departure from the body of federal labor law is present. *Wood v. Chesborough*, 228 US 672, 676-80 (1913). If no adequate non-federal ground supports the state court judgment, the court has jurisdiction. *Klinger v. Missouri*, 13 Wall 257, 263 (1871). Otherwise, Supreme Court jurisdiction would be defeated by an inapplicable selection of some local ground for the decision.

We invoke this court's jurisdiction to review as a necessary means to declare and maintain uniform principles of constitutional law. *Martin v. Hunter's Lessee*, 1 Wheat 304 (1816). The citizens of Puerto Rico are United States citizens protected by the federal Constitution. The Commonwealth cannot under section 2 of Chapter 145 of the Organic Act of March 2, 1917 still effective under the Compact, 64 Stat. 319, deprive United States citizens of any fundamental right without passing the strict scrutiny of this Supreme Court. Such obligation arises under the Organic provision "as if Puerto Rico were a state of the Union and subject to the provisions of Art. VI(2)(1) of the Constitution". *Posadas, supra*.

Constitutional Provisions, Law and Rules

First Amendment, United States Constitution:

> "Congress shall make no law *** abridging the freedom of speech ***."

Fifth Amendment, United States Constitution:

> "No person shall be *** deprived of life, liberty, or property, without due process of law ***."

Fourteenth Amendment, United States Constitution:

> "Section 1. *** No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Act 80, of May 30, 1976: Unjust Dismissal Act, 29 LPRA §185b:

> "It will be understood to constitute just cause for the dismissal of an employee in a business:
>
> (a) That the worker follows an improper or disorderly pattern of conduct.
>
> (b) The attitude of the worker of not rendering his work efficiently, or of rendering it late and negligently or in

violation to the quality standards of the product produced or handled by the establishment.

(c) The repeated violation by the employee of the reasonable rules and regulations adopted for the functioning of the establishment provided that a written copy of the same be furnished opportunely to the worker.

* * *

"It will not be considered a discharge for just cause that which is made by pure caprice of the employer or for no reason related to the good and normal function of the establishment." (Our translation.)

Act 65 of July 3, 1986, 29 LPRA §185b, amending Act 80, supra:

"It will not be considered a discharge for just cause that which is made by pure caprice of the employer or for no reason related to the good and normal function of the establishment. *Nor will it be considered just cause for the discharge of an employee the cooperation or expressions made by him, related to the business of his employer, in an investigation before any administrative, judicial or legislative forum in Puerto Rico. In this last case, the employee so discharged will have the right, in addition to any other corresponding adjudication, that his immediate reinstatement to his job be ordered and that he be compensated for a sum equal to the salaries and benefits that he has not received from the date of his discharge until a tribunal orders his reinstatement to his employment.* (Our translation.)

Act No. 9, of October 3, 1986, 29 LPRA §185b, amending Act 80:

". . . . Nor will it be considered just cause for the discharge of an employee the cooperation or expressions made by him, related to the business of his employer, in an investigation before any administrative, judicial or legislative forum in Puerto Rico *when such statements are not of a defamatory character nor constitute the disclosure of privileged information according to law.* In this last case, the employee so discharged will have the right, in addition to any other corresponding adjudication, that his immediate reinstatement to his job be ordered and that he be compensated for a sum equal to the salaries and benefits that he has not received from the date of his discharge until *his reinstatement.* (Our translation.)

Collective Bargaining Agreement, Art. V. Complaints and Grievances:

"If there should arise any controversy, of any kind, between the Union and the Employer regarding the interpretation, application or administration of any term or terms of this Collective Bargaining Agreement, or regarding the disciplinary sanction of one or more employees, said matter must be resolved in a final and binding manner, pursuant to the following procedure:

First Step * * *
Second Step * * *
Third Step * * *

"Fourth Step. Within 30 days after the decision of the Casino Director, or after the time period that the Casino Director has to render his decision has expired, the Union may proceed to Arbitration. . . . .

"3. When an issue or controversy is referred to arbitration, the parties must try to submit a submission agreement to the arbitrator containing the question or questions to be resolved by the arbitrator. If the parties are unable to reach a submission agreement, the arbitrator, after hearing the proposals of both parties on the subject, shall then be able to formulate the question or questions to be resolved. Nothing in this clause shall be understood to be a limitation of the faculties that the arbitrator has or may have pursuant to the arbitration clause of this Collective Bargaining Agreement.

"4. The jurisdiction of the arbitrator shall be exclusively determined by the terms of this Collective Bargaining Agreement. The arbitrator shall not be empowered or authorized to extend his jurisdiction to cover issues not included in the Agreement, but he must decide any controversy related to compliance with the procedural steps required to bring the matter to arbitration."

"5. The arbitrator has no jurisdiction to alter, amend or modify the provisions of this Agreement, and any award which violates this provision shall be considered *null and void.* (emphasis supplied)

"6. The arbitrator's duties shall be adjudicative and not legislative, and he shall not have jurisdiction to consider or resolve any matter related to the negotiation of a new Agreement.

"7. The arbitrator shall also have jurisdiction to decide whether an employee has been dismissed or suspended without just cause; provided, however, that the arbitrator shall not have jurisdiction to consider and resolve any complaint regarding the suspension or discharge of a probationary employee. . . .

"8. The decision of the arbitrator shall be final and binding for the contracting parties as well as for all of the employees covered by this collective bargaining agreement *provided that it is in accordance with the law.* The determinations of fact shall be conclusive, *except for the question of procedural or substantive arbitrability, which shall be resolved in the first instance by the Arbitrator but may be subject to judicial review.*" (emphasis added)

"9. If any of the parties fails to appear before the Arbitrator after having been duly notified of the hearing, the arbitrator may issue his award based on the evidence submitted by the party that was present.

"17. Management shall also be entitled to use the arbitration procedure as a quick solution to any controversy involving the interpretation or application of this Collective Bargaining Agreement or the regulations governing its union personnel, notwithstanding the fact that the preceding paragraphs were drafted to process the grievance of the employees and/or the Union, pursuant to the same conditions stipulated by the parties.

Statement of the Case

A unitary statement of this case, and the companion case filed before this Court on the same date is appropriate for an orderly comprehensive presentation to this Court.

Condado Plaza and the Casino Employees Union, hereinafter referred to as the Union, negotiated and signed a collective bargaining agreement (CBA) that ended a 107-day labor dispute on February 22, 1985 for a three year term. During the labor strife, the Union's attorney and the then vice-president, Víctor Villalba, repeatedly made use of the press accusing both Mr. Hugh Andrews, President of Williams Hospitality Management Corporation, hereinafter referred to as Williams, and Williams: of monopolizing the games of chance in Puerto Rico; of influence-peddling in the Tourism Company and in the Legislature to increase the gaming betting limits; of violating the

prohibition to advertise casinos and eliminating the dress code of the gaming law; of controlling, and offering jobs to, the Tourism Gaming Directors to influence them in taking away power from the government inspectors and; of taking away vested benefits from its employees. The petitioner never answered the charges in the arena of the press, as proved to the Arbitrator.

Condado Plaza prevailed in its demands for productivity in exchange for the Union's financial demands. The Union accepted an increase in the workday from seven hours to 7:20 hours; the exclusion of the meal period from the definition of "workday" that had been paid as time worked; and a change in the scheduling of active shifts at the table. Before, a croupier worked one hour at the gaming table and would rest half an hour, which within a 7 hour work day, that included the meal half-hour period, yielded only five hours of productive time. Condado Plaza negotiated the shifts observed in other jurisdictions of one hour active work at the table, and a 20 minute rest. These changes allowed Management a yield of six productive work-hours, which allowed them to open more tables with the same employees. Although the Union at the table feared the loss of employment if they granted this demand; once the contract was signed, more employees were hired since many of the replacements used during the labor dispute were hired in addition to the regular work force. Since Condado Plaza is a union shop, Villalba had to know that there had been an increase in jobs, since union members and dues increased as a result.

On February 28, 1985—one week after the CBA was signed—the Legislature of Puerto Rico approved Joint Resolution 102 to study the tourist industry, picking up Villalba's continuous charges of monopolistic tendencies. On November 27, 1985 public hearings were held. Both Villalba and Andrews were summoned to appear before the Senate. Villalba, a Condado Plaza croupier, requested leave with pay from the Director of Human Resources to testify about the development of tourism, and was granted leave. Instead, in the presence of Andrews, at the Legislature Villalba addressed his entire report, reproduced in the Award [App. (ii)B, p. 19] and question-answer period to defame his employer.

Andrews believed that Villalba abused his constitutional right to freedom of speech—taking advantage of the influential public forum—when publicly charging the commission of several crimes,

providing false data knowingly in at least 13 items[4] and attacking the concessions that he freely bargained away in exchange for other benefits he had been granted at the bargaining table; thus eroding industrial peace and disrupting his business; and that to give his points of view on the development of tourism, he did not have to launch an attack against Williams libeling and humiliating him in front of the press and attending audience. This second round of accusations was not sparked by a heated labor dispute. Yet, he did not take action against Villalba until a major, tangible damage resulted as a direct consequence of his employee's malicious accusations. On November 29, 1985, the Department of the Treasury withheld the casino license that on November 26 it had approved for the El San Juan Hotel, a sister operation of Condado Plaza to be managed by Williams and scheduled to commence business on December 10, 1985, until a monopoly investigation on Williams was conducted by the Departments of Justice and Treasury.[5] On November 30, 1985, Andrews privately dismissed Villalba for malicious libel and defamation to Williams' reputation, for disloyalty, and interference with the sound operations of its business under the just cause provisions of Act 80 of May 30, 1976, 29 LPRA §185(b), as then effective.

On December 6, 1985, Villalba gave a press conference making the same libelous accusations as evidenced by the videos of two TV channels submitted to the Arbitrator. The petitioner never made comments to the press nor appeared on Television, as proved at Arbitration. On that same day, the Treasury Department had reconsidered the denial of the license and issued a provisional one conditioned to the result of the monopoly investigation without a right to appeal, as per the letter submitted to the Arbitrator.

[4]Extensive documentary and testimonial evidence, charts, statistics, tables, graphs, financial reports, lists, etc. was submitted to the Arbitrator showing that Villalba knew in fact that his accusations were totally false; and still recklessly made them.

[5]This direct damage was proved to the Arbitrator through the testimony of the Deputy Secretary of the Treasury, Manuel Sarmiento, at the Arbitration Hearing; and yet the Court below in its Judgment concluded that Condado Plaza could not prove its case on appeal but had to prove it at the arbitration level: where it did prove it.

Villalba sought arbitration of his grievance. On January 13, 1986 a triad of arbitrators was submitted to the parties by the Bureau. The parties selected Arbitrator Juan T. Rodríguez in February 1986. On that date Villalba's brother was working in the Bureau as Arbitrator, a serious concern that Condado Plaza trusted could be resolved when raising the lack of substantive jurisdiction as a defense at the corresponding hearing before Arbitrator Rodríguez.[6]

On January 30, 1986 . . . and on April 8, 1986 Villalba appeared before the House of Representatives repeating the false charges against his Employer. The official records of the November 27, 1985, January 30 and April 8, 1986 legislative transcripts were submitted to Arbitrator Rodríguez. As a result of his statements:

a. Williams was denied the license for operating the casino at El San Juan, then was issued a conditional license during one whole year.

b. Williams was subjected to further legislative investigations that resulted in several bills to impose taxes on all concessionaires that controlled more than 50% of the gambling, and to limit the number of licenses authorized to them.[7]

c. The Legislature adopted several bills to criminally penalize the employer, which did not become law but caused concern, anguish and uncertainty to the owners and stockholders and took time and cost money to defeat.

d. The permanent financing of the Hotel San Juan was delayed for two years when the Treasury conditioned the casino license to the investigation of monopoly, because the investors did not want to risk their money if the hotel did not have a casino to make the operation financially feasible.

These real mediate and immediate damages caused by Villalba to his employer are evident in detail in the extensive record, and which substantial evidence, the arbitrator evaded in his award; and the Court erroneously ignored in the invalid judgment at bar.[8]

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[6]*United Steelworkers v. Warrior & Gulf Navigation*, 363 US 585 (1961) *et al.*; *Enterprise Wheel, infra.*

[7]All three bills adopted as a by-product of Villalba's speech, as well as the position statements that Williams had to address to the President of the Senate and the Governor of Puerto Rico were submitted to Arbitrator Rodríguez.

[8]The Court below relied as grounds for affirming the Judgment on an amendment to Act 80, *supra*, that was adopted AFTER the discharge to prospectively prohibit the dismissal of an employee for statements in the Legislature.

On March 3, 1986 House Bill 712 was introduced amending Act 80, *supra*, to provide that the statements that an employee makes before any administrative or legislative forum against his employer will not be just cause for dismissal. Condado Plaza did not find out about the bill immediately since it was not invited to depose.

On April 3, 1986 the Arbitrator set the first hearing of the case for May 13, 1986. But, on April 4, and 8, 1986 the Secretary of Labor, officially appeared at the public hearings held, endorsed HB 712, and recommended that instead of the remedy of severance pay prevalent in Act 80; for that particular cause of dismissal, the reinstatement of the employee with back pay be adopted. It was requested to be heard on a subsequent date at the Legislature; but was never afforded the opportunity. When Condado Plaza learned about the Secretary's appearance and opinion, it requested on April 24, 1986 and was granted a continuance of the hearing to June 2, 1986. On May 22, 1986, the Legislative Assembly hastily approved HB 712. On that same date, since the opinion of the Secretary censuring the actions taken by the employer and *sub judice* in his Department could become law, in an effort to abide by its contractual obligations yet get a fair trial, Condado Plaza sent a letter to Villalba setting forth the basis for disqualification of the Bureau and requesting that the government arbitrator be substituted by a private arbitrator mutually chosen in accordance with the alternate method of resolving controversies contained in Article V §10 of the CBA.

On May 28, 1986 Villalba rejected the alternate method on the grounds that the government service was free of charge, and because there was no reason to recuse the Bureau. Since the reply was not received until June 6, 1986, on May 30, 1986 a Petition for Declaratory Judgment was filed in District Court for the First District, Case No. 86-0848, under section 301 of the National Labor Relations Act, 29 USCA § 185, in which the federal questions were raised anticipating that Condado Plaza would be deprived of its constitutional right to due process since the Secretary of Labor had publicly prejudged the issue *sub judice* before its Bureau. [App. (v)D, p. 140]

On June 2, 1986, at the beginning of the arbitration hearing, Condado Plaza timely raised before the Arbitrator the issues of disqualification of the entire Bureau and of substantive arbitrability. The conflict of having the Bureau report to the Secretary of Labor under the local labor statute when Condado Plaza is engaged in

interstate commerce and subject to the National Labor Relations Act, 29 USC § 172, that extracted such services from the US Department of Labor to protect impartiality and assigned it directly to the President of the United States was raised as part of the federal question posed and due process constitutional right. On the same date, the conflict with precedents from this Supreme Court on the question of substantive arbitrability was also raised. We have appended partial references of the official arbitration record to prove that the federal questions and the First v. Fifth and Fourteenth Amendment rights issues were duly raised. [App.(v)C, pp. 109-139]

This hearing was continued since the Arbitrator improperly delegated to the Director of the Bureau the ruling on the issues raised. On August 1, 1986, the Director decided that the motion for disqualification and substantive arbitrability was untimely raised since by selecting an arbitrator Condado Plaza had already submitted to its jurisdiction. The case was then rescheduled for September 26, 1986.

On September 8, 1986 Condado Plaza moved the District Court to stay the arbitration proceedings in aid of jurisdiction. On September 17, 1986 the Motion was denied. [App.(v)E, p. 149]

On September 26, 1986 Condado Plaza again raised the federal and constitutional questions to the Arbitrator, who is really the adjudicator that the parties vest with jurisdiction through a submission agreement and a CBA. [App. (v)C, p. 109] It tried in vain to have the Arbitrator first resolve whether he had jurisdiction or not under the agreement, allowing judicial review of the substantive arbitrability and disqualification issues, before hearing the merits of the dismissal, in accordance with the text of the agreement. The Arbitrator denied its motion forcing the merits of the dismissal or else he would continue the hearing *ex parte*. No jurisdiction was conceded to the Arbitrator in the submission agreement to resolve the merits of the dismissal limiting his purview to the determination of substantive arbitrability, that in the first instance he was supposed to resolve since the question of disqualification had been decided against Condado Plaza. But the Arbitrator adopted the proposal of the union that included both controversies, even though his jurisdiction was being challenged and the contractual right to judicial review properly raised.

On October 24, 1986 we filed a second motion in District Court to stay the hearing on the merits of the dismissal. It was denied. [App. (v)F, p. 153][9]

The record of 17 hearings over the jurisdictional and disqualification aspects shows that Condado Plaza never waived its rights BUT HAD NO ALTERNATIVE THAN TO PARTICIPATE TO RESPONSIBLY DEFEND ITS RIGHTS WITHOUT THE RISK OF HAVING AN ABANDONMENT OF THE COURT ROOM HELD AGAINST IT. Upon their conclusion and before entering the merits of the dismissal, Condado Plaza again raised the constitutional rights conflict. Sixteen hearings on the dismissal for just cause were held. On December 19, 1989 Villalba took the stand. (TR 9-137) He did not even try to prove that his statements were true nor produced any evidence to contradict the documentary and testimonial factual evidence introduced by the Employer including the extensive proof on damages that the Arbitrator chose never to mention in his award. At the time, Villalba worked for the Union earning only $230 less than as a croupier.

On May 25, 1990 briefs on the substantive arbitrability and disqualification issues were simultaneously submitted; and, on July 31, 1990 briefs on the merits of the dismissal were filed. Condado Plaza submitted summaries of the evidence that were not objected to by Respondents. In the arbitration briefs the questions were argued at great length.[10] Both awards were issued and notified on the same date although the numbers given to them were A-1036 and A-2270 instead of consecutive, which suggests that the arbitrability award, although issued before, was held back until the second award was written to defeat judicial review.

Condado Plaza never stood a chance in arbitration. Therefore, on April 8, 1991 we filed two petitions for review in the Superior Court that were assigned to two different court rooms in spite of our request

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[9]Standard *Drywall v. Painter*, 111 LRRM 2723 (1982). The Supreme Court of the United States stated in *W. R. Grace & Co. v. Local Union 759, Int'l Union of URCL & PWA*, 51 LW 4643 (1983), that:

> "The employer could have taken the initiative of seeking declaratory and injunctive relief prior to the commencement of arbitration."

[10]Due to the length of the Briefs and Summary of the Evidence filed at the arbitration stage, we shall reserve the translation and enclosure of those two documents for the Appendix should the writ be issued by this Court.

that both of them be assigned to the first court because the two controversies were interrelated. The questions were again raised at the state superior court level in the respective petitions for review of the two awards. [App. (v)B, p. 80][11] On August 21, 1991 the Honorable Judge Wilfredo Alicea issued a judgment in the first case providing:

> "Consistent with the prior exposition, the Court issued the following judgment:
>
> "a. It is decreed that the Arbitrator, Juan T. Rodríguez as well as the Conciliation and Arbitration Bureau of the Department of Labor and Human Resources, *must abstain from deciding the complaint on its merits, except for any stipulation to the contrary by the parties.*
>
> "b. The writ for review is denied as to the remaining assertions of errors, leaving the arbitration award in force."

On September 10, 1991 we timely raised a copy of the Judgment to the Superior Court Judge Angel F. Rossy, informing him that the award before him on the discharge—issued by the Arbitrator in transgression to the abstention ordered—was invalid *ab initio*. Inasmuch as he had not decided and the term to request the review of the Judgment of Judge Alicea was close to expire, we filed our writ for review in Case Number CE-91-616 in the court below on September 25, 1991. On that same day, Judge Rossy sustained the validity of the dismissal award, without any acknowledgement of the Judgment enjoining the Bureau and Arbitrator Rodríguez from intervening in the dismissal. A petition for review was filed in Case CE-91-690 before the Puerto Rico Supreme Court.

The First versus Fifth and Fourteenth constitutional issues and the federal labor law questions were raised on review before the Supreme Court as evidenced in the Petitions for Review. [App. (v)A, p.47]

The Questions are Substantial

The first phase of this case posed in the companion case is about the basic foundation of our system of constitutional law that every individual deserves a fair and impartial trial as a minimum requirement of the due process of law guaranteed by the Constitution of the United States. *Marshall v. Jerrico*, 446 U.S. 238 (1979), *In Re Murchison*, 349 U.S. 113, 116 (1954).

[11]The second petition is included in the Appendix of the companion case.

As this Court long ago established in *Offutt v. United States*, 348 U.S. 11 (1954): "Justice must satisfy the appearance of justice."

The second phase of this case poses the proper standard for the review of arbitration awards when substantial constitutional rights have been properly raised in all stages of the proceedings and the CBA from which the Arbitrator's draws its jurisdiction contains a qualified choice of arbitration as a means to resolve the parties contract dispute and not an absolute waiver of the courts in favor of arbitration.

The core question is whether a false, libelous, ill-willed opinion given by an employee in the legislative forum is so protected by the First Amendment free speech constitutional guarantee that an employer that has been directly deprived of his Fifth Amendment constitutional right to the property, use and enjoyment of its tangible (business) and intangible property (good name and reputation), proven actual mediate and immediate damages in the Arbitration hearing, cannot justly discharge him for disloyalty, improper conduct and disruption of its business, short of his right to recover damages civilly. *Milkovich v. Lorain Journal Co.*, 58 LW 4846 (1990).

(I)

When an Arbitrator's Award Fails to Draw its Essence From The CBA The Appropriate Standard of Review is Not Limited, But Independent, Review Especially Where a Conflict of Constitutional Rights is the Crux of the Issue and the Award Must Be Rendered in Conformity to Law as a Mutual Condition to Its Finality.

The judicial restraint accorded to awards when the dispute arises out of the collective bargaining process is not applicable to jurisdictional issues or cases where the award fails to draw its essence from the CBA demonstrating an Arbitrator's infidelity to his obligation. *W.R. Grace & Co.*, 461 US 757 (1982); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 US 351, 357 (1971); *Enterprise Wheel & Car Corp.*, 363 US 593 (1960); *Gulf & Warrior Navigation Co.*, 363 US 574 (1960); *McGuinney v. Missouri-Kansas-Texas R. Co.*, 357 US 265, 268-270 (1958); *Lincoln Mills, A.T.& T., supra.*

The First Circuit Court of Appeals, under which Puerto Rico falls, has adopted a two-prong test to vacate an award. *Hoteles Condado*

Beach, La Concha and Convention Center v. Union de Tronquistas de Puerto Rico, Local 901, 763 F.2d 34 (CA 1, 1985); *Bettencourt v. Boston Edison*, 560 F.2d 1045 (CAI, 1977):

1. When the award is unfounded in reason or fact, and so unconnected with the wording and purpose of the contract as to manifest an infidelity to the obligation of the arbitrator.
2. When the award is outside the CBA itself because it is based on reasoning so palpably faulty that no judge could ever conceivably have made such a ruling.

There exist cases where the conduct or result of an arbitration proceeding is so distant from the mutual expectations embodied in the CBA or so alien to the impartiality and fairness envisioned in an arbitration proceeding as a whole, that an award resulting from said proceeding must be set aside since it is unfaithful to the obligation of the arbitrator. Thus, an award will be disregarded by a court on a showing of "fraud or bad faith or demonstrated bias or collusion." *Early v. Eastern Transfer*, 699 F.2d 552 (CA 1, 1983). In our case, the parties substituted the Arbitrator by the courts *only* on the condition that his award would be in accordance with the law. It WAS NOT an absolute waiver of the courts in favor of arbitration. We DID NOT give carte blanche to the Arbitrator. Our CBA clearly tells him that if his award DOES NOT CONFORM TO LAW, it is not final; but subject to judicial review.

The courts below knew that this case was sequel to the one in which serious germane issues had been raised to another Courtroom regarding arbitrability, disqualification, violation of constitutional rights. The Court was timely informed that another Judge had ordered, in the case from which the one that was under his consideration stemmed, the disqualification of the Bureau and of the Arbitrator. Yet, it deferred to arbitration on the merits.

The Court below should have determined whether the asserted errors were founded before deferring to the controverted award since the general doctrine is not applicable in the case of the record. Yet, it failed to apply the standard of review that it had adopted since 1949, *J.R.T. v. N.Y. and P.R. S/S Co.*, 69 P.R.R. 782 (1949): that when the CBA, the submission agreement, or a statute provides that the Arbitrator should render his award pursuant to the law, he is bound to follow the law and must issue his awards in accordance with the prevailing legal doctrines; or else the award is subject to full judicial

review. If there was any doubt about extending independent review as an exception, the court below clarified it in *Sonic Knitting Industries v. I.L.G.W.U.*, 6 TPR 783 (1977); *UIL de Ponce v. Destileria Serrallés*, 116 DPR 348 (1985).* The clear doctrine in Puerto Rico is that the function of an Arbitrator that is required by the parties to decide in accordance with law is one analogous to that practiced by a sentencing lower court [of first instance in the civil court system], whereby the appellate forum can independently review the issues and judge the correctness and validity of the award apart from the limited review recognized under the traditional causes for setting aside an award.

In view of the substantial questions raised in this writ, this Court should review if the Judgment at bar is in accordance with the federal law applicable in Puerto Rico to industries engaged in interstate commerce in the labor field, *Lincoln Mills, supra;* and whether the award affirmed by said Judgment drew its essence from the CBA, *W.R. Grace, supra,* when its conclusions of law are not in line with this Court precedents on First Amendment abuse of free speech that affect the honor, reputation, property and business of a private person as argued under the fifth question raised herein.

The Determinations of Fact are not Substantiated by the Totality of the Record Whereby it Constitutes an Error of Law.

The Arbitrator's and Court's findings of fact on the issues of arbitrability, disqualification, and constitutional rights are not supported by the ample, clear evidence on the record as a whole. This error of reliance on "non-facts" becomes a reviewable error of law. *Universal Camera Corp. v. NLRB*, 340 US 474 (1951). Due to page limitations we cannot exhaust here this argument. Suffice it to point out that the Arbitrator erroneously omitted in his award any reference to the proven damages in arbitration that Villalba's statements caused his employer. This led the Court to mistakenly conclude in its Judgment [App. (i)A, p. 1]

> ". . . . Assuming that the conduct of the appellee has constituted an infraction, in the case at bar it was not shown before the arbitrator that Mr. Villalba's testimony negatively affected the appellant's business. *Such a showing* cannot be *done in the* process of legal review. . . ."

This erroneous conclusion is based on a non-fact. Several hearings were devoted to prove damages, including testimony of the Deputy Secretary of the Treasury that denied the license.[12] To move this Court's discretion we list some grounds to prove this error:

— the public humiliation to Andrews when hearing the false charges against his company, not thinking then about disciplining the employee who gratuitously defamed him but rather on how to repair the damage caused. [Hearings of October 20, 1987, TR 102-4, 107; January 22, 1988, TR 9, 14-15]

— the immediate denial of the casino license on November 29, 1985 to El San Juan Hotel scheduled to open four days later specifically on the basis of Villalba's statements. [Hearings of January 22, 1988, TR 16-17, June 28, 1988, TR 23 et seq.; September 8, 1989, TR 3-31 (Manuel Sarmiento's testimony); September 9, 1988, TR 72 et seq. Exhibit 42, Letter of December 6, 1985 from the Treasury Department]

— Two-year delay to obtain permanent financing for the El San Juan Hotel as no PR, US or European bank wanted to assume the risk of financing $30 million without the certainty of a casino license. The provisional nature of the license did not afford sufficient guarantees. [Hearing of December 1, 1987 (complete); January 22, 1988 (complete); September 27, 1988, TR 16-18; 26-27; 87-89, 93-94, October 7, 1988, TR 59-60]

— Operating financial difficulties as a result of the delay in the permanent financing. [January 22, 1988 Hearing, TR 18]

— Loss of other managing contracts for Williams since other investors feared government refusal of a casino license to Williams due to Villalba's monopoly charge, limiting Williams expansion with specific examples and identification of the interested companies. [January 22, 1988, TR 20-21, 26-28]

— The monopoly charge caused the Legislature to order an investigation of Williams and submitted three bills. [Exhibits 1, 2, 4, 29] One of them provided that no company could control more than 50% of the market, levying a tax on any excess above 50%, with the concomitant loss in time and money in meetings

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[12]We are in a position to prove—with reference to the page in the official transcript—every damage alleged in the Statement of the Case.

with legislative and executive branches, including the Governor. [October 7, 1988 Hearing, TR 30, 40-42, 60-61]

Evidence in the record dramatizes the palpably faulty reasoning based on non-facts that produced a decision that no judge would have reached. In view of the page limitations for the time we refer this court to App. (v)G, p. 156 where examples of evidence in the record regarding the falsity of the statements made, and the fact that Villalba knew that they were false, were given to the court below in our Motion of Rehearing when they issued the Judgment under Rule 50. The Arbitrator concentrated his award on the libel of charging violation of the anti-monopoly law in spite of the fact that two other felonies were charged, which constitute libel *per se*. He ruled that he could not find that Villalba had charged a violation to the gaming law, which is a penal statute, when there are at least two documents with Villalba's own signature, two official legislative transcripts, newspaper articles, and videos from Channel 2 and 4 that we presented to support such a finding.

All of the hearings were officially transcribed. The documental evidence was substantial. The Court is in the same position to weigh the testimonial evidence because there is no controversy over the credibility of the witnesses; nor over the facts that gave rise to the dismissal. And, the case revolves around an interpretation of the law that this Court is in the best position to settle.

By granting review, this Court will afford Condado Plaza its right to due process denied by the Courts below when they deferred to an award that did not draw its essence from the CBA as it did not conform to the condition imposed by the parties that it must be in accordance with the law, issued over a court injunctive order.

(II)

A False, Defamatory Statement By an Employee Under the Guise Of an Opinion Is Not Constitutionally Protected Speech Simply Because the Forum is a Legislative Assembly When He Intends, and Petitions for, Damages To the Reputation and Business Of His Employer.

The Court below erred in confirming an award contrary to Law that involves a substantial controversy of constitutional law. The Constitution does not protect under the guarantee of freedom of speech any ill-intended opinion based on facts known to be false by

the defamer, or negligently uncorroborated, that damage the reputation and property of a person protected by the Puerto Rico Constitution and under the common law rights recognized by this Supreme Court in the interpretation of the First Amendment rights under the United States Constitution. *Milkovich, supra,* firmly established that the constitutional privilege does not extend to an "opinion" as part of the guarantees of the First amendment—contrary to the protection extended to Villalba's "opinion" by the Arbitrator and the lower courts. The Award and Judgment at bar granted protection to proven false statements— under the guise of an opinion— that DID cause damages to the employer of the worker who publicly defamed him simply because the "opinion" was given in the legislative forum. But, in *McDonald v. Smith,* 105 S. Ct. 2787 (1985), this Court already decided that:[13]

> "There is no sound basis for granting greater constitutional protection to petitioning than to other First Amendment expressions."

Furthermore, in *U.S. v. Grace,* 51 LW 4444 (1983), quoting *Adderly v. Florida,* 385 U.S. 39 (1966), this Court established that the right to freedom of speech is not unlimited:

> "We have regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."

These precedents are applicable to our case and do not conflict with the Commonwealth's Supreme Court prior case law on the field. The right to freedom of speech was consecrated in Article II, § 4 of the Puerto Rico Constitution. The right to honor and reputation was elevated to constitutional rank in 1952, Article II, §8. The equilibrium of these rights is maintained unharmed *provided that good use is made* of the right of freedom of speech and it is *not abused. Pueblo v. Pacheco Padró,* 58 PPR 739 (1941). On the other hand, false statements in the Legislature have not received greater protection than other false statements in Puerto Rico. In *Pueblo v. Pérez Casillas,* 17 TPR 466 (1986), facing a perjury charge from statements made in the Legislature during the investigative hearings related with the events of the murders at Cerro Maravilla by the Police, the court below held:

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[13]See: *D. & B. v. Greenmoss Builders, Inc.,* 53 LW 4866, (1985); *Connick v. Myers,* 461 U.S. 146 (1982); *California Motor Transport v. Trucking Unlimited,* 404 U.S. 508 (1972); 50 Am Jur 2d. pp. 705, 734.

> Thus, under Penal Code, Art. 225, perjury is committed when a person testifies before a legislative committee as to the truth of a material fact, knowing it to be false.
>
> "The protection does not extend to perjured testimony. *U.S. Applebaum*, 445 U.S. 115 (1980)." [at 448]

The Arbitrator never even considered the fact that Villalba committed perjury, a felony, because he never weighed in his award the issue of the falsity of the statements, dwelling only on the fact as to whether they were libelous. But, if the statements were not true, and caused damage they are defamatory. Three of them charged that Condado Plaza committed crimes punishable by law. The charging of a crime is libel *per se*. The Arbitrator had to pass judgment on the veracity of falseness of the statements. We rest on *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568; *Herbert v. Lando*, 441 U.S. 153 (1979); 50 Am Jur 2d, §455. In order that the defense of the truth may prosper in a libel case, the defamer has to show not only that the fact is true but also that the publication was made with good intentions and for justifiable purposes. *Beauharnais v. Illinois*, 343 U.S. 250 (1952). The Arbitrator had no exculpatory evidence before him. He evaded the weight of this finding by concluding that he could not locate said statements in the record. We can prove otherwise with specific reference to the exhibits and transcript page reference if this Court accepts review.

The Court Commits an Error When It Confirmed an Award That Determines That Williams And Andrews Are Subject To the Test Of Malice For A Public Figure.

The individual right to a reputation overrides the abuse of freedom of speech—even when the press is involved—except when the criticism or defamation is directed towards public officials, in which case another trend covers it stemming from the interest of the citizenry in monitoring officials who must be accountable to public processes, as discussed further on. The ruling case on libel is *New York Times Co. v. Sullivan*, 376 U.S. 254 (1963). The doctrine was further elaborated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973); and in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). In the latter this Court stated:

> "The standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254, as later extended, which bars media liability for

defamation of a public figure absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth, is inapplicable to the facts of this case.

"a. Respondent was not a 'public figure' since she did not occupy a role of special prominence in the affairs of society" and had not been 'thrust . . . to the forefront of the particular public controversies in order to influence the resolution of the issues involved. Gertz * * *

As to what constitutes a public controversy, the Court said:

"But in doing so, petitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 US 29 (1971), which concluded that the New York Times privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In Gertz, however, the court repudiated this position, stating that "extension of the New York Times test proposed by the Rosenbloom plurality would abridge a legitimate state interest to a degree that we find unacceptable." 418 U.S. at 346. "Petitioner would have us extend the reasoning of *Cox Broadcasting* to safeguard even inaccurate and false statements, at least where "actual malice" has not been established. But its argument proves too much. It may be that all reports of judicial proceedings contain some informational value implicating the First Amendment, but recognizing this is little different from labeling all judicial proceedings matters of 'public or general interest' . . . Presumptively, erecting the New York Times barrier against all plaintiffs seeking to recover for injuries from defamatory falsehoods published in what are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the First Amendment. And in some instances, such an undiscriminating approach might achieve results directly at odds with the constitutional balance intended . . . our decision in that case should make it clear that no such blanket privilege for reports of judicial proceedings is to be found in the

> constitution . . . As to inaccurate and defamatory reports of facts, *matters deserving no First Amendment protection*, see 418 U.S. at 340. We think Gertz provides an adequate safeguard for the constitutionally protected interest of the press and affords it a tolerable margin for error by requiring some type of fault."

Philadelphia Newspapers, Inc. v. Hepps, 54 LW 4375 (1986), also deals with the balance between the rights to freedom of speech and reputation. Expanding on Gertz, Justice O'Connor reasoned:

> "One can discern in these decisions two forces that may reshape the common law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or a public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by common law. When the speech is of public concern but the plaintiff is a private figure, as in Gertz, the constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some other range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 US 4866 (1985), the constitutional requirements do not necessarily force any change in at least some of the features of the common law landscape."

Although neither Williams nor Andrews are public figures, evidence on the falsity of the statements was painstakingly introduced. Villalba did not undertake to prove their truth. We rest on *Waldbaum v. Greenbelt Consumer Service, Inc.*, 627 F. 2d 1287 (1980) as a persuasive lower court opinion on public figures:

> "From analyzing Gertz and more recent defamation cases, we believe that a person can be a general public figure only if he is a "celebrity"—his name a "household word"—whose ideas and actions the public in fact follows with great interest. We also conclude that a person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific

> public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants. In undertaking this examination, a court must look through the eyes of a reasonable person at the facts taken as a whole.
>
> "With this background, we turn to the standards themselves for determining when a person is a public figure. A court first must ask whether the plaintiff is a public figure for all purposes. Gertz, as noted above, held that a plaintiff would be found to be a general public figure only after a clear showing of "general fame or notoriety in the community and pervasive involvement in the affairs of society. . ." He must have assumed 'a role of especial prominence in the affairs of society. . .' *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Accord, Wolston v. Reader's Digest Association*, 443 U.S. 157 (1979). In other words, a general public figure is a well known celebrity, his name a 'household word.' The public recognizes him and follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of its attention or because be (*sic*) actively pursues that consideration.
>
> "Few people, of course, attain the general notoriety that would make them public figures for all purposes."

The record shows that if Andrews, received a publicity highlight in the press, it was not promoted by him. It was Villalba, who made constant statements in the press and held several press conferences that were televised. Andrews never answered. If anyone jumped into the public arena, it was Villalba. The notoriety created by him cannot turn a person that never went before the press, TV or any publicity media into a public figure as incorrectly held by the Arbitrator and affirmed by the Court.

A corporation can be slandered. It is recognized as a person. It can sue for libel with respect to its business, credit, stockholders, and officers when it suffers damages. Likewise, it can recover for defamation that affects its financial position, credit, prestige, its methods of business; or when it is accused of fraud, a crime, or bad management.[14] Dealing with criticisms of commercial conduct, the

[14]33 Am. Jur. §193, p. 183; 50 Am. Jur. 2d 497, *Libel and Slander*, pp. 497-781; *Herbert v. Lando*, 441 U.S. 153 (1979); *Owens v. Scott Publishing Co.*, 84 P. 2d 296 cert. den. 350 U.S. 968 (1955); *Meyerson v. Huribut*, 98 F. 2d 232, cert. den. 305 U.S. 610 (1938); *Coop. de Serguros Multiples de P.R. v. San Juan*, 294 F. Supp. 627 (1968).

protection is clearer. In *Vegod Corp. v. American Broadcasting Companies, Inc.*, 603 P. 2d 14 (1980), in which a company that worked at closing businesses was defamed, the Court said:

> "Criticism of commercial conduct does not deserve the special protection of the actual malice test, balancing one individual's limited First Amendment interest against another's reputation interest. We conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows that those assuming the role of business practice critics do not acquire the First Amendment privilege to denigrate such entrepreneur."

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F. 2d 583 (CA 1, 1980), had to do with a corporation that built quality boats and had an excellent reputation until the quality of their boats was questioned in an article, and it sued for libel. Quoting one of the most outstanding authors in constitutional law, L. Tribe, American Constitutional Law, pg. 645 (1978), the Court of Appeals stated:

> "A fairly high threshold of public activity is evidently necessary for a finding that a person has voluntarily plunged into a public controversy."
>
> "We recognize the attraction of broad and clear-cut definitions in terms of simplifying litigation, but we cannot see how corporations as a class can be said to be 'public figures' for First Amendment purposes. . ."

Andrews is hardly a "household word." Neither is Williams, a corporation that never thrusted itself into the public arena and who was the most adversely affected "person". Not only the name and product of the corporation was questioned but its property interests immediately and mediately affected by the employee. If a libeled person, be it natural or juridical, has the recognized right to recover from the defamer actual damages in a libel suit, how could it be unjust to dismiss that defamer before he continued to disrupt his business? *Connick v. Myers*, 461 U.S. 146, (1982).

The conclusion of law that Andrews and Williams were public figures that had to meet the malice test is ground for revoking the Judgment and Resolution below. . .and setting aside the Awards.

(III)

Under Prevalent Labor Law, An Employer Can Discharge A Disloyal Employee That Causes Damages to His Service, Product or Business.

A Judgment that confirms an award that holds that the federal labor doctrine woven under the National Labor Relations Act on the disloyalty that discredits the service or product of a company as just cause for dismissal is inapplicable to this case cannot stand.

The Arbitrator rules out *NRLB v. Electrical Workers*, 33 LRRM 2183, quoting the landmark case of *Jefferson Standard Broadcasting Company*, 94 NLRB 1507, enf'd. 346 U.S. 464 (1953), on grounds that the statements made by Villalba referred to the whole industry. Such a conclusion is grossly erroneous. It is evident that from the second paragraph of his statement, Villalba launched his attack on Williams. It was Williams that Villalba characterized as monopolizing gaming in Puerto Rico. He petitioned the Legislature to curb Williams expansion; and, to deny it loans and subsidies. He was not referring to the entire industry then. He never identified any other employer, but his own, by name. The libelous opinion singled out one company that was not the subject of legislative investigation *per se*. The public detraction to Andrews and Williams was made in the presence of its President, causing him personal humiliation. But the harm to the good name transcended Andrews, although every accusation made to Williams was obviously directed to the person who headed it . . . Andrews. The damages caused have been argued elsewhere; and they were PROVED.

The *Jefferson* case in which the dismissal of the Union president was sustained for distributing leaflets that generated comments in the community, and that caused âpprehension in the employer and loss of income, is certainly in point. We quote: (at page 2186)

> "There is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.
>
> "They did not indicate that they sought to secure any benefit for themselves, as employees, by casting discredit upon the

> employer. (nor in our case as Villalba's recommendations were against the best interest of the Union membership)
> "The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. . . . The handbill . . . attacked public policies of the company which had no discernible relation to the labor controversy".

In addition, we rest on several lower court cases that sustain that the actions tending to destroy the business of an employer are disloyal, illegal and cause for dismissal: *NLRB v. Knuth Brothers, Inc.*, 92 LRRM 3275 (7th Cir. 1976); *American Tel. & Tel. Co. v. NLRB*, (2d Cir. 1975).

The Judgment and Award is Contrary to Act 80 of May 30, 1976, as Amended and to the Ruling Case Law.

Under the Jefferson rationale, once it has been proven that the disloyal and improper action of an employee actually took place and harmed the business and commercial reputation of the employer, the employee's discharge is justified. This dismissal is not unreasonable, capricious, or illegal. What would not be reasonable is that an employer must keep an employee who is undermining his public trust, that promotes the destruction or limitation of his business, who publicly humiliates the President of the company charging him of events that he knows all too well are not true. It does not further the federal public policy of the bargaining process to strengthen labor-management relations, when after the bargaining of a CBA, one party undermines it publicly.

This is not a case of whistle blowing. We are not before an employee claiming a statutory right denied by his employer. Surely an employer cannot retaliate because an employee claims his due—even if the employee proves to be wrong. Here Villalba was blowing the whistle intentionally or grossly negligent to request action against him employer without asserting any violation to his statutory rights as an employee.

Before discharging Villalba, Condado Plaza took into consideration the federal and local statutory, constitutional and case law. As here cited, the Puerto Rico Dismissal Act 80, *supra*, considered justified the discharge of an employee for improper conduct {§2(a)} and for any cause if related to the interference with the sound management

and proper functioning of the employer's business. His discharge met the statutory criteria. It met the casuistry *stare decisis* prevalent in November 1985 . . . when the action was taken.

In line with the leading case of *Sec. of Labor v. I.T.T. Western Hemisphere Directories, Inc.*, 8 T.P.R. 564 (1979), which was the applicable legal precedent at the time of the dismissal . . . and still is; one isolated action, although not favored, is sufficient cause for a discharge if serious enough or where to allow its recurrence would be untenable for an employer. Condado Plaza considered Villalba's improper uncalled conduct against it serious enough not to await for a third occurrence, considering that a year before, during the labor dispute, the first occurrence had taken place . . . and forgiven. As in federal labor law, the leading case also established that an Arbitrator cannot substitute the criteria of an employer whose collective bargaining agreement grants him exclusive authority for establishing reasonable rules and for managing his business. Such is the case of Condado Plaza's CBA at bar.

Thus, federal and local law in 1985 allowed Condado Plaza to discharge Villalba for actions that harmed its business. But, the Judgment and Award on the merits did not rest on the applicable state of the law at the time of the dismissal. A Judgment that rests on a subsequent statutory amendment and which, thus, did not give due notice that the dismissal could be "unjust" is untenable under the due process notice requirements of the First Amendment.

As a legislative reaction to this dismissal, on July 3, 1986, Act 65 was approved amending Act 80 to define as unjust the discharge of an employee for ANY statements during an investigation before any administrative, judicial or legislative forum. This impulsive reaction was later moderated by Act 9 of October 3, 1986, where the legislator qualified that the statements protected in Act 65, did not include when they were defamatory or constituted a disclosure of privileged information on the company's business. Even more important, both laws provided that they would go into effect immediately *after* approved. Yet, the Arbitrator used the amendments as a yardstick throughout his award. And the Court below committed the same error. [App. (i)a, p. 5, fn. 2]

In accordance with the general principles of civil law prevalent in Puerto Rico:

> "the laws shall not have retroactive effect, if not *expressly* provided otherwise. In no case may the retroactive effect of a law, harm the vested rights under the above-mentioned legislation." 31 LPRA Sect. 3

Puerto Rico Supreme Court case law follow the same principles. The amendments to a law have *prospective* effect except when otherwise provided. *Vázquez v. Morales*, 14 TPR 1059, 1067 (1983). In *Luce and Co. v. JSM*, 62 PRR 431 (1943), a similar controversy arose, where the statute in controversy, was born as an answer to a strike conflict. The Court below then decided that the new legal protection was not available to the strikers since the law went into force after the conflict and did not expressly provide for its retroactivity. Here, the Court below erred in affirming the award.

In point is the case of *Garcia v. American Airlines*, 673 F Supp 63, 66 [DCPR 1987], in which — exactly as in our case — the dismissal occurred in November of 1985, eight months before the effective date of Act 65. The District Court for the District of Puerto Rico, however, decided:

> "Puerto Rico adheres to the general non-retroactivity of the laws. 31 LPRA Sect. 3. Only when the legislature intends retrospective application can this general rule be avoided, but such intent must be clear on the face of the statute . . . *Law 65 is clearly intended to operate prospectively* . . . We find no reason to circumvent 31 Sect. 3 policy and *thereby impose an undue burden on the defendant to confirm its action with non-existent law*. We shall *not therefore impose the non-retaliation law retrospectively. CF Dion v. Secretary of Health and Human Services*, 823 F2d 669, 671" (1st Cir 1987). (Emphasis added)

The Judgment at bar is contrary to law and federal precedent. It rests on Act 65 and law 9, imposing a burden on the employer of complying with a non-existent law. Giving retroactive effect would be unconstitutional since it would deprive the employer of his property and name without due process of law. To give retroactivity through judicial interpretation, contrary to the doctrine of separation of powers, constitutes an invalid substitution of the criteria and express intent of the legislator by the Arbitrator and by the Court below.

No judge could reasonably have reached the palpably erroneous decision made by a biased Arbitrator, who did not have the qualifications to decide substantial constitutional and statutory rights.

His blatantly erroneous award should be set aside as local law and precedent cannot override constitutional and locally applicable federal law under the present relationship of Puerto Rico and the United States of America.

Conclusion

For these reasons, this Honorable Court should note probable jurisdiction and grant our petition for certiorari.

Respectfully submitted,

Dated: July 20, 1992

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* No official translated publications available yet of cases identified with *.

92-201

No. 92-

SUPREME COURT, U.S.
FILED
JUL 20 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

CONDADO PLAZA HOTEL & CASINO,

Petitioner,

against

ASOCIACION DE EMPLEADOS DE CASINO DE PUERTO RICO, CONCILIATION AND ARBITRATION BUREAU ARBITRATOR JUAN T. RODRIGUEZ,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

Appendix to Petition for a Writ of Certiorari

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(8074A—LC6-616—1992)

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APPENDIX (i)

CERTIFIED TRANSLATION

IN THE SUPREME COURT OF PUERTO RICO

CONDADO PLAZA HOTEL & CASINO,
Defendant-Petitioner,

v.

CASINO EMPLOYEES ASSOCIATION; CONCILIATION AND ARBITRATION BUREAU and/or JUAN P. RODRIGUEZ,

Plaintiff-Respondent.

CE-91-690 Administrative Review

JUDGMENT

(RULE 50)

San Juan, Puerto Rico, January 17, 1992.

There is no controversy whatsoever as far as the facts that have given rise to the present writ. These are summarized as follows:

Through House Resolution 102 of February 28, 1985, the House of Representatives of Puerto Rico ordered its commissions of Tourism, Commerce and Industry, Labor and Veterans Affairs to jointly carry out a study of the Puerto Rican tourist industry for the purpose of said entities being able to "*exercise*

their initiative to participate effectively in the determination of public policy regarding tourism." To that end, said commissions were to examine, among other factors, "*the Games of Chance Act, the regulations that put it into effect* and the focus that should prevail in any tourist activity." Finally, said study "*shall also be aimed at determining if there are monopolistic practices in the industry and other bad practices that could threaten the normal competition between the hotels.*"

For the purpose of performing their task, said commissions summoned several persons to be deposed at a public hearing that was held on November 27, 1985. One of the people summoned was the President of the Puerto Rico Casino Employees Association, the respondent Víctor Villalba, who at that time was an employee of the Condado Plaza Hotel & Casino. Mr. Hugh Andrews, President of Williams Hospitality Management, owner of said hotel also appeared and testified at said hearing.

Mr. Villalba testified that in the tourist industry in Puerto Rico there is a monopolistic tendency on behalf of Williams Hospitality Management, which was not only the owner of Condado Plaza Hotel & Casino, but also had acquired the operations of the Palmas del Mar Casino and was proposing to reopen the Hotel San Juan in Isla Verde. He added that said enterprise monopolizes fifty-two per cent (52%) of the total of games of chance in Puerto Rico. In addition, he stated that Williams Hospitality Management started the process of reducing the traditional formula of the casino employees of a half hour of rest for each work hour to twenty (20) minutes of rest for each hour of work which, according to Mr. Villalba, represented a decrease of more than one hundred (100) jobs in the casinos during the dead tourism period.

During his testimony Mr. Villalba also added that under the leadership of Williams Hospitality Management the large hotel consortiums in the country managed to get an amendment to the Games of Chance Act to increase the betting limit from

$1,000.00 to $2,000.00 at the dice and black jack tables thereby "attempting to turn Puerto Rico into a gaming emporium, similar to Las Vegas and Atlantic City. He ended his presentation saying that on occasions the management of the hotels forces the croupiers to work under uncomfortable and irregular conditions, and cited as an example an incident, recent at that time, at the Condado Plaza Hotel, when the casino at said hotel stayed open in spite of the fact that there was a power outage in that sector of the Condado area, whereby the employees at the casino had to continue working with little lighting, without air conditioning in a place where there is no lighting whatsoever "and under conditions that intensify total extenuation (*sic*)."

Three days after the date of said appearance, Mr. Villalba was dismissed from his job. In the letter sent to him for that reason, the following grounds were stated for the dismissal:

> "Your formal written position attests that you are undermining the very grounds of my company's stability and the job security of the employees you represent. You are attacking our progress, accusing us of violating the anti-monopolistic laws, questioning government aid to us, challenging sound legislation and regulations to promote gaming sponsored by us, fostering discouragement of local patronage that maintains our casino during the off season and opposing our promotion of U.S. players to come to play in our casino, all of which are (*sic*) contrary to the best interests of the business that employs you."

Not in agreement with said dismissal, the matter was submitted to the above-mentioned Conciliation and Arbitration Bureau of the Department of Labor by the Employees Association, in accordance with what is provided in the collective bargaining agreement in force between said union and the appellant.

On March 8, 1991, the arbitrator Juan T. Rodríguez issued two awards; the first one resolved that the complaint filed by Mr. Villalba was arbitrable; the second determined that the dismissal of Mr. Villalba was not justified. Not in agreement with that, the appellant filed two lawsuits before the Superior Court, San Juan Division, each one challenging each award.[1]

In the present writ, the award being challenged is that which determines that the dismissal of Mr. Villalba was not justified. Through a judgment dated September 25, 1991, the Superior Court, San Juan Division, confirmed said award to the effect that the dismissal was unjustified, and modified it only for the purpose of making the corresponding adjustment for the income derived by Mr. Villalba while he was unemployed. The forum of instance held:

> "that the statements of the employee were not based on false fact: having testified in good faith in compliance with the summons that was delivered to him by the

[1]It is not under our consideration in this appeal to determine whether the complaint is arbitrable and if the disqualification of Arbitrator Rodríguez is proper. That was the subject of another writ, number CE-91-616. Let us see. On August 21, 1991, the Superior Court, San Juan Division, through the voice of the Honorable Judge Alicea López, issued a judgment where it resolved that: 1) the Arbitrator Juan T. Rodríguez, as well as the Conciliation and Arbitration Bureau of the Department of Labor and Human Resources should abstain from resolving the complaint on its merits, except for a stipulation to the contrary by the parties; and 2) the petition for review in the remaining observations of errors is denied, leaving the arbitration award in force. Not in agreement with said judgment, the Condado Plaza & Hotel appeared before us through case number CE-91-616, where it questioned, among other things, the determination of arbitrability and once again raised the problem of the disqualification of the arbitrator and the Bureau. Through a resolution dated November 1, 1991, we denied the request for review. On November 15, the appellant filed a motion for reconsideration, which was denied through a ruling on December 6, 1991 and notified on December 10, of said year. The mandate was sent on December 16. On December 26, the appellant filed a second motion for reconsideration. On January 10, 1992, it was denied by its being filed outside of the time frame, in accordance with Rule 45(c) of the Supreme Court Regulations.

> Tourism Commission, who had the duty of reexamining the tourist industry in all of its aspects, contributing, through his testimony, ideas and suggestions directed at improving the Tourist Industry. In proceeding in this manner he complied completely with the purpose of the summons that was served on him. . ."

From said judgment the appellant, Condado Plaza Hotel & Casino comes forth indicating, in a nutshell, that the determination that the dismissal was not justified is erroneous. It is not right.

The determinations of the arbitrator are fully supported by the evidence. The statements of employee Villalba were not based on false facts. They were not defamatory. Mr. Villalba testified in good faith to a legislative commission before which he was summoned.[2] We concur with the court *a quo* in the sense that, with his testimony, Mr. Villalba contributed ideas and suggestions directed at improving the tourist industry. We then conclude that the forum of instance did not err inconfirming the award challenged in this writ. The evidence

[2]We cannot fail to mention that on July 3, 1986, the Legislative Assembly passed Law No. 65 to amend Law 80 of May 30, 1976 (29 L.P.R.A. 185 b). Thus, a statute was expressly incorporated into our legal system that repudiated the dismissal in reprisal against a worker that, by testifying at legislative, administrative or judicial proceedings makes representations related to the business of his employer, provided that these are not of a defamatory nature nor constitute a disclosure of privileged information according to the law. In its Statement of Reasons, the Legislative Assembly emphasized that:

> The *public policy in force and reiterated* holds the protection of the workers at their jobs in high esteem. This protection is extended to the appearance of workers in various forums. It is necessary to *ratify* and *confirm this protection* and the protection of the workers at their jobs should remain clear and visibly established, when they appear before the Legislature, administrative and judicial forums to collaborate with said forums and, in addition, to make statements about the business of their employers, without it being considered just cause for dismissal. Statement of Reasons for Law No. 65 of July 3, 1986, L.P.R.A. 232 (Underlining added.)

supports the determinations of fact and the conclusions of law that are drawn from it.

On the other hand, we have resolved that Law No. 80 of May 30, 1976 (29 L.P.R.A. sect. 185), known as the Law on Unjustified Dismissals, does not favor the dismissal as a sanction of the first infraction. *Secretario del Trabajo v. ITT*, 108 D.P.R. 536 (1979). Nevertheless, the dismissal is justified after a first infraction if it affects the good operation of the business. *Id.* Assuming that the conduct of the appellee has constituted an infraction, in the case at bar it was not shown before the arbitrator that the Mr. Villalba's testimony negatively affected the appellant's business. Such a showing cannot be done in the process of legal review, since when the parties choose to submit their controversies in an arbitration process, they have substituted the arbitrator for the courts. *Union General de Trabajadores v. Challenger*, res. March 29, 1990, 90 JTS 43, 7606 and cases cited therein.

Wherefore, the judgment issued by the San Juan Division of the Superior Court of Puerto Rico (the Hon. Angel F. Rossy) on September 25, 1991 is confirmed.

So pronounced and mandated by the Court and certified by the General Clerk. The Presiding Judge Mr. Pons Nuñez did not intervene.

(Sgd.) Francisco R. Agrait Lladó
General Clerk

Received
Jan. 23, 1992

United States District Court
For the District of Puerto Rico
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To be a correct translation prepared by
Daniel Tomlinson 5-12-92
Certified Court Interpreter
Administrative Office of the
United States Courts

CERTIFIED TRANSLATION

01 of 01

COMMONWEALTH OF PUERTO RICO
GENERAL JUSTICE COURT
SUPREME COURT

CONDADO PLAZA HOTEL & CASINO,
Petitioner,

vs.

CASINO EMPLOYEES ASSOCIATION *et al.*,
Respondent.

CASE: CE-91-0690 ORIG. CASE: KAC91-0543
CIVIL ACTION
CIVIL ACTION OR OFFENSE

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RECEIVED
JAN 23, 1992

NOTIFICATION

I CERTIFY THAT IN REGARD TO THE REQUEST FOR REVIEW THE COURT ISSUED THE ATTACHED RULING.

CARRERAS ROVIRA JOSE E-MIDTOWN BLDG. OFFICE 206-421 MUNOZ RIVERA AVE.

SAN JUAN, PUERTO RICO, JANUARY 21, 1992

FRANCISCO R. AGRAIT LLADO
GENERAL CLERK
(SGD.) DEPUTY CLERK

United States District Court
For the District of Puerto Rico
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Daniel Tomlinson 5-12-92
Certified Court Interpreter
Administrative Office of the
United States Courts

APPENDIX (ii)(a)

CERTIFIED TRANSLATION

IN THE

SUPERIOR COURT OF PUERTO RICO

SAN JUAN DIVISION

CONDADO PLAZA HOTEL & CASINO

Respondent-Petitioner

Vs.

CASINO EMPLOYEES ASSOCIATION, CONCILIATION AND ARBITRATION BUREAU AND/OR JUAN T. RODRIGUEZ

Complainant-Respondent

CIVIL NO. KAC91-0543 (901)

RE: REVIEW ARBITRATION AWARD

JUDGMENT

I

In the case at bar the Respondent-Petitioner, Condado Plaza Hotel & Casino, filed a writ seeking the review of Arbitration Award No. A-2270, issued on March 8, 1991 by Arbitra-

tor Juan T. Rodríguez, of the Conciliation and Arbitration Bureau of the Puerto Rico Department of Labor, on the ground that it is not consistent to law, contrary to what has been agreed to in the Collective Bargaining Agreement.[1] In said award the Arbitrator decided that the complainant did not commit any error which may merit disciplinary action against him, thus decreeing that there was no justification for his dismissal. As a remedy he ordered his immediate reinstatement and the payment of all of the wages not received in harmony with the provisions of the agreement. By granting the remedy he did not provide for any adjustment for any income whatsoever received by the employee from other sources.

Being prepared to decide after a careful analysis of the grounds of the challenge invoked in view of the totality of the documents in the record, the applicable law and the interpretative case law, we hold that no reason, or justification exists for the modification of the Award as far as the determination declaring the impropriety of the dismissal and ordering as a remedy his reinstatement with retroactive pay. We nevertheless decide that it is proper to modify it for the sole purpose of ordering the pertinent adjustment in order to discount the income earned by the employee during the period of time between the dismissal and his reinstatement. Thus modified, we decide that the confirmation of the Award is in order.

---

[1]As grounds for revocation it is cited that the determinations of fact of the Arbitrator are not substantiated by the evidence provided; that the conclusion of law to the extent that the dismissal of Victor Villalba was not justified is contrary to Law No. 80 of May 30, 1976, article 2, 29 LPRA § 185 (b); that the Arbitrator erred in concluding that the statements of Victor Villalba at the Tourism Committee were not defamatory; that in the case before its consideration, the doctrine of disloyal conduct of an employee, as just cause for the dismissal perpetrated under the National Labor Relations Act, was applicable; and that he erred in ordering the reinstatement of the employee to his position, with retroactive pay, without considering the income received by the employee from other sources during that period of time.

II

For greater clarity of our decree we must start by pointing out that the facts relevant to the controversy, as determined by the Arbitrator, are fully supported by the evidence. In particular, the facts that Victor Villalba was an employee of the Condado Plaza Hotel & Casino and President of the Casino Employees Association are uncontroverted. In that capacity he was summoned to testify before the Tourism Committee in hearings to take place on November 27, 1985. Said summons was issued in compliance with the Resolution of the House of Representatives No. 102, of March 8, 1985, through which the Committee of Tourism, Commerce and Industry and Labor and Veterans Affairs were ordered to conduct a study regarding the Puerto Rican tourism industry. At the hearing of reference Mr. Villalba appeared in his capacity as President of the Casino Employees Association and he read a statement regarding the matter for which he was summoned, which was transcribed and integrally incorporated in the Award which is the subject of review. Mr. Hugh Andrews, President of the Petitioner Hotel also appeared and testified. Three days after the complainant had testified, and through a letter dated November 30, 1985, which was signed by Mr. Hugh Andrews, in his capacity as President of the Condado Plaza Hotel, by Carl Kortum as General Manager of the Casino, and by Homero San Antonio in his capacity as Operations Manager of the Casino, the complainant was- notified of his dismissal effective that same day. As grounds for the action taken he was indicated that the information given in his report was false, destructive, disloyal and contrary to the interests of the employees that he represented.

Based on the evidence submitted by the parties and, in particular, on the content of the statements of the complainant as indicated, the Arbitrator issued his Award deciding that the statements and representations of Mr. Villalba before the House of Representatives were not defamatory nor did they

constitute grounds for taking disciplinary action against him. As a consequence, he decided that the dismissal of Mr. Victor Villalba was unjust and ordered his reinstatement.

III

The reasons for which an Award, based on a voluntary submission, can be challenged, boil down to fraud, improper conduct, lack of due process in the holding of the hearing, violation of public policy, lack of jurisdiction and that the Award does not solve all of the matters of controversy that were submitted. *JRT v. Otis Elevator Co.*, 105 DPR 95 (1976); *JRT v. NY & PR S/S Co.*, 69 DPR 782, 800 (1949). However, the collective bargaining agreement in force between the parties conditions the finality of the Award to the resolution of the controversies according to law, which empowers the parties to turn to the judicial forum to challenge the Award issued, not only regarding the causes for invalidity traditionally recognized, but rather to review the correctness and judicial validity of the Award issued. *Sonic Knitting Industries v. ILGWU*, 106 DPR 557 (1977), *UIL de Ponce v. Dest. Serrallés, Inc.*, 116 DPR 348, 353 (1985).

As to the errors pointed out by the Petitioner regarding the determination that the dismissal of Mr. Villalba was not justified, we have considered them and decide that no reason or grounds exists to modify or revoke this determination of the Arbitrator, in the absence of any meritorious assertions because we believe that the findings of the Arbitrator are fully supported by the evidence. It is worth mentioning here that when the parties choose to submit their controversies to a process of arbitration, they have substituted the courts by the Arbitrator and cannot during the process of judicial review relitigate the case before a Court. *UGT v. Challenger*, 90 JTS 43.

We therefore concur with the interpretation of the Arbitrator to the effect that the report of the employee was not based on

false facts, since he had testified in good faith in compliance with the summons that was served on him by the Tourism Committee, who had the task of reexamining the tourism industry in all of its aspects, contributing ideas and suggestions through his testimony, aimed at the improvement of the Tourism Industry.[2] By proceeding in that manner he complied fully with the purpose of the summons which was served on him.[3]

As to the assertions of error referring to the omission of the Arbitrator in not recognizing and ordering the necessary adjustment for the income earned by the employee from other sources, we decide that the modification of the Award in this aspect is in order. Let us see.

As to what is relevant for us, Article V, subsection 7 of the Agreement provides as follows:

> "The Arbitrator will also have jurisdiction to decide as to whether an employee has been dismissed or suspended without just cause; provided, nevertheless, that the Arbitrator will not have jurisdiction to consider and

---

[2]It is worth pointing out that in 29 LPRA 185(b), a section which was amended in contemplation of situations like the one at hand, expressly provides as follows:

> "Neither will the collaboration or statements made by an employee, related to the business of his employer, in an investigation before any administrative, judicial or legislative forum in Puerto Rico be considered just cause for the dismissal of an employee; when said statements are not of defamatory nature nor do they constitute a disclosure of privileged information according to the law."

[3]According to what has been indicated, in the case at bar, the dismissal of Mr. Villalba was based on the statements that he made in his appearance before the Tourism Committee, statements that were made in response to a summons that was served on him in his capacity as President of the Casino Employees Association. Once said statements had been considered, as they were, in light of the applicable law, the Arbitrator decided that they were not of defamatory nature and did not constitute cause nor could they be grounds for the dismissal of the complainant.

> decide any complaint regarding the dismissal or suspension of a probationary employee.
>
> In these cases where the Union alleges that an employee was dismissed or suspended without just cause, the Arbitrator will have the authority, if he determines that the employee was dismissed or suspended without just cause, to formulate the pertinent adequate and fair remedy or remedies, including, but not to be construed as limited to, the reinstatement of the employee at this previous position with or without back pay. *The income received by the employee during the time he was suspended from his job and salary will be credited against the amount or amounts of money that the Arbitrator determines corresponds to the employee for loss of back pay.*

In the case at bar, according to what has been previously mentioned, the Arbitrator ordered the reinstatement of the employee with the right to retroactive pay, a determination which is consistent with the powers that were vested and which are contemplated in the Collective Bargaining Agreement. Nevertheless, when granting the remedy he failed to order the corresponding adjustment for income earned by the complainant, which provides grounds for the observation of error formulated here by the petitioner regarding said particular.

It is inferred from a reading of the previously mentioned clause that the parties expressly agreed in the Collective Bargaining Agreement that in the event that reinstatement with retroactive pay is ordered, "the income received by the employee during the time he was suspended from his job and salary will be credited against the amount or amounts of money that the Arbitrator determines correspond to the employee for loss of back pay."

Since the parties had so agreed, the Arbitrator does not have the discretion to relieve a complainant of the effects of the corresponding adjustment, being obligated, when granting the remedy, to order the adjustment for income earned by the employee during the period of employment suspension. It is worth pointing out that in the discharge of his responsibility, an Arbitrator, when interpreting and applying the clauses of the agreement, lacks the authority to modify or amend them by incorporating new language therein. Even when there is controversy between the parties, if the language used in the Agreement is clear, he shall abide by its literal and evident meaning. *Elkouri & Elkouri, How Arbitration Works,* 3rd. Ed., 1973, pages 246, 300, 303. The Supreme Court of the United States has expressed in that same regard in considering the function of an Arbitrator in the interpretation of an agreement clause. Therefore, in *United Steel Workers v. Enterprise Wheel Car Corp.*, 363 U.S. 593, 597, it stated the following:

> *"Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.* He may of course look for guidance from many sources, *yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.* When the arbitrator's words manifest an infidelity to the obligation, *courts have no choice but to refuse enforcement of the award."*

In applying the principles of law previously reported to the particular facts of this case we conclude that the Arbitrator, by not applying the clause of the Collective Bargaining Agreement to order the corresponding adjustment for the income earned by the employee from other sources, committed an error.

Based on the previously expressed grounds, the appealed Award is modified for the purpose of ordering that any income

that the employee, Victor Villalba, may have earned from other sources during the period of time that he was suspended from his job, be deducted from the retroactive pay ordered. Thereby modified, we confirm the Award issued on March 8, 1991 by the Arbitrator Juan T. Rodriguez, Case No. A-2270.

ENTER AND NOTIFY:

In San Juan, Puerto Rico, on September 25, 1991.

(Sgd.) Angel F. Rossy Garcia
Superior Court Judge

I CERTIFY:

Paulita Santiago Cartagena
Acting General Clerk

By:

(Sgd.) Maria Serrano
Deputy Clerk

United States District Courts
For the District of Puerto Rico
—CERTIFIED—
To be a correct translation prepared by
Daniel Tomlinson 5-27-92
Certified Court Interpreter
Administrative Office of the
United States Courts

CERTIFIED TRANSLATION

IN THE

SUPERIOR COURT OF PUERTO RICO

SAN JUAN DIVISION

UNITED STATES OF AMERICA,)) SS:

THE PRESIDENT OF THE U.S.))

CONDADO PLAZA HOTEL & CASINO

Plaintiff

vs.

CASINO EMPLOYEES ASSOCIATION CONCILIATION AND ARBITRATION BUREAU, ETC.

Defendant

CIVIL NO. KAC91-0543 Room: 901

RE: REVIEW OF ARBITRATION AWARD ETC.

ATTORNEY MARIA MILAGROS SOTO
22 YARDLEY PLACE,
SUITE 200
SANTURCE, PUERTO RICO 00911

RECEIVED
OCT 7, 1991

NOTICE OF JUDGMENT

THE CLERK who signs below notifies you that this Court has entered judgment in the above-captioned case on the date

of *September 25, 1991*, that it has been duly entered and filed in the case record, where you may learn in detail of its terms.

And, since you are or represent the party damaged by the judgment, which can be appealed, I direct this notice to you, having filed a copy thereof in the record of this case dated *September 26, 1991*.

ATTY. MARIA MILAGROS SOTO—22 YARDLEY PLACE, SUITE 200, SANTURCE, PUERTO RICO 00911

ATTY. JOSE CARRERAS ROVIRA—206 MIDTOWN BLDG., 421 MUNOZ RIVERA AVE., HATO REY, PUERTO RICO 00918

SAN JUAN, P.R., September 26, 1991

PAULITA SANTIAGO CARTAGENA
Clerk

By: María Serrano
Deputy Clerk

United States District Court
For the District of Puerto Rico
—CERTIFIED—
To be a correct translation prepared by
Daniel Tomlinson 5-27-92
Certified Court Interpreter
Administrative Office of the
United States Courts

APPENDIX (ii)(b)

CERTIFIED TRANSLATION

[Words appearing in italics (except within brackets) are already in English.]

ARBITRATION AWARD

ON: DISMISSAL OF MR. VICTOR VILLALBA (MERITS)

CASE NUMBER A-2270 *[ink stamp: RECEIVED MAY 12 1991]*

Having ruled on the question of substantive arbitrability, we must determine if the dismissal was justified or not.

The following facts, we understand, are pertinent to the decision of this part of the dispute:

1) On February 22, 1985, the Union and the Employer signed a Collective Bargaining Agreement that ended a lock-out that last around 107 days.

2) One of the most important points in controversy, from the negotiation, was the Employer's proposal (which eventually prevailed) to the effect that the "croupiers' minutes of rest be reduced from 30 to 20 minutes for each hour worked.

3) On March 8, 1985 the House of Representatives approved H.R. 102 in which its Tourism, Commerce and Industry and Labor and Veterans Affairs Committee* was ordered to carry out a study on the Puerto Rican Tourist Industry.

*Hereinafter "the Committee".

4) The statement of motives of said Resolution mentions, among its purposes, to offer the House: "the opportunity to take a comprehensive look at the tourist industry . . ."; the promotion of internal tourism for Puerto Ricans . . .; the analysis of the proliferation of strikes among the personnel that work in the casinos; matching of tourism to the cultural reality and the goals of economic development, the conservation of jobs that are generated by tourism and the benefits that the employees receive from these; to determine if there are monopolistic practices in the industry or other bad practices that could affect the normal competition among hotels . . .; to determine the conditions under which these special incentives should be offered, etc.

5) The Committee summoned several persons to a hearing, which took place on November 27, 1985, to depose regarding said Resolution. One of the persons called was the President of the Association of Casino Employees, Mr. Victor Villalba, an employee of the Condado Plaza Hotel and Casino and plaintiff in this case. The Association presided by Mister Villalba grouped together both the employees of Condado Plaza and those of the Dupont Plaza.

6) He read the following statement on the subjects presented in the Resolution:*

> "Mister President and members of this honorable Committee, my name is Víctor Villalba and I am the President of the Puerto Rico Association of Casino Employees.
>
> I come before this Honorable Committee to explain the point of view of the organization over which I preside regarding House Resolution 102. I also intend to contribute to the best of my ability to the purpose of

*Just as it appears transcribed. See Employer's Exhibit 12.

seeking those ideas and suggestions which, from my point of view, will assist to improve the Puerto Rico Tourist Industry.

We will start by pointing out that one of the phenomena that we must keep in mind in any analysis of the Puerto Rico Tourist Industry is the tendency towards a monopolistic concentration of capital that has been developing concomitantly to a growing degree of narrowness and economic precariousness within that industrial sector.

As the industry undergoes a time of economic contraction, a marked monopolistic tendency on the part of one of the largest hotel consortiums established in the country continues to grow.

A clear example of the situation described above is that while a considerable number of hotels have had to close their doors in recent years, and others have had to operate with financial limitations, William Hospitality Management is currently the owner of Condado Plaza Holiday Inn,—I correct myself, it is now called Condado Plaza, but for general purposes everybody knows it as Condado Plaza Holiday Inn—has begun a monopolistic acquisition process of other hotel operations on the Island.

Besides purchasing Palmas del Mar Hotel operations, in-mid December of this year it will reopen the Hotel San Juan in Isla Verde.

In order to visualize what this means, it is necessary to understand the fact that according to the information offered by the company itself, the Condado Plaza Holiday Inn casino monopolizes 52% of the gambling in the Puerto Rico casinos.

Anyone who has an idea of the amount of money that is gambled daily will know exactly what we are talking about. But still more, with the opening of the

Hotel San Juan this percentage of monopolization of gambling will increase substantially by controlling a large amount of tourism in the strategic area of Isla Verde, and because it is the opening of a big hotel.

The sad thing about this situation is that the Government, through the Department of Tourism and the Banco Gubernamental de Fomento (Government Development Bank), offers loans and subsidies to a company that, contrary to the policy of promoting employment, has taken measures to reduce them substantially, taking away labor victories from Tourism Industry workers.

The Williams Hospitality Management was the company that started the process of reducing the traditional formula of casino workers of one hour worked per half-hour rest by one hour of work per 20 minutes rest. This was a benefit that the casino employees had enjoyed for years due to the exhausting, tedious and delicate work carried out in the gaming rooms, but which this multimillon-dollar company reduced in one fell swoop, which served as a spearhead for other hotel consortiums in the country do the same with their casino employees.

The purpose of this measure is none other than to operate the casinos using less personnel. Which represents, in our estimation, a reduction during tourism's off season of more than 100 jobs on the Island.

Under the leadership of Williams Hospitality Management, the country's large hotel consortiums succeeded in getting the Legislature and amend the Gambling Law, which made possible, among other things, an increase in the betting limit from 1,000 to 2,000 dollars at the dice and "*black jack*" tables. It is our understanding that the purpose of this is none other

than to try to turn Puerto Rico into a gambling emporium, similar to Las Vegas and Atlantic City.

Notwithstanding what little tourism is being brought to Puerto Rico, there are around 10 casinos operating on the island at the present moment, and it is expected that four additional casinos will open.

With the abolition of the rule that requires a suit and tie in order to enter the casino, the entry of the common Puerto Rican citizen to the gaming rooms is propitiated. Not necessarily belonging to traditional tourist groups.

This dress code, in addition to the prohibition of advertising the casinos in the public mass media or doing street propaganda to promote them, was enacted by past governments to keep gambling from spreading among the common Puerto Rican citizens. Notwithstanding, this doesn't seem to be the intention of those who are out to turn Puerto Rico into a gambling emporium. It is necessary to make a study of the kind of tourism that is being brought to Puerto Rico. A common practice in the casinos is to attract "*junkers*", which are none other but wealthy gamblers, compulsive or professional, to whom the hotel offers free lodgings, drinks and food, and pays their tickets to Puerto Rico if they in turn bring large sums of money to bet in the gambling rooms.

Obviously, this kind of tourist is not the one that goes into the streets with his family to enliven the business in the tourist areas. This is a nighttime tourist who is up all night until the casino closes at 4:00 in the morning and spends the day sleeping and is only seen during part of the afternoons in the hotel's swimming pool or in the bar.

The country needs a specific strategy for the development of the Tourist Industry, whose publicity

campaign should take into account the kind of tourist that is to be attracted to the country and the social classes and sectors outside the country to which that campaign should be directed.

It seems that we have failed by concentrating the campaigns outside the country among those social classes of high acquisitional power and we have forgotten the upper middle class that also constitutes tourism and goes on vacation trips with its family, because most definitely the promotional campaigns that are carried out in the United States for Las Vegas and Atlantic City are not necessarily the same ones as those that are developed for other tourist sites in the Nation.

One thing that we have lost sight of in Puerto Rico, on the other hand, is that the strategy to make Puerto Rico an attraction for a certain type of tourists, must run parallel to the infrastructural development of the country's tourist sites. There can be no dichotomy between one thing and the other. Both strategies, the tourist promotion to certain groups of tourists and that of infrastructural development of certain a type of tourism sites, must be harmonized in an adequate manner in a single line of thought, because otherwise we will fall irremissibly in a hodgepodge of approaches that will never quite gel and will therefore lack real effectiveness.

To conclude, I suggest that on the other hand, more power be given to government casino inspectors. These public officials need more power in order to interface in a direct and adequate manner in the routine work of the country's casinos, be it by keeping order or by dealing with people who enter the gaming rooms completely drunk, as well as by watching for the comfort in those places.

On occasions hotel management makes the croupiers work under uncomfortable and irregular conditions. Like what happened last Wednesday, when the casino at the Hotel Condado Plaza remained open even when the lights went out in the Condado sector. At the insistence of the employer, the casino employees had to continue working with poor lighting, without air conditioning in a place where there is no kind of ventilation, and under conditions that intensify utter exhaustion. In cases like these, a government inspector with more powers could intervene as an impartial agent to solve situations like the one described.

It is obvious, to conclude, that in the development of the Tourist Industry, a series of factors come together that cannot be viewed separately and which require concerted attention.

The problem existing in one area of that industry will necessarily have repercussions in the other areas. That is why a broad perspective is needed of the problems that affect the Tourist Industry in Puerto Rico.

Thank you."

7) Also present at the legislative hearings was Mr. Hugh Andrews, the Company's President, who made statements on the subjects of the Resolution and on Mr. Villalba's statement.

8) Through a letter dated November 30, 1985 (three days after the complainant read his statement before the Committee) Mr. Andrews fires the complainant. Among the most important reasons stated in the letter we find the following: that the complainant undermines the stability of the company, its progress and the workers' employment security; that he accuses it of violating anti-monopolistic laws; that he ques-

tions government aid to the company; that he challenges sound legislation and regulations sponsored by them that promote gambling; that he discourages local patronage of the casino during the off season; that he is against the promotion of gamblers from the United States; that he knowingly provides false information in regards to job reduction in the Company; that he accuses the Company in the question-and-answer period of having violated the gambling laws and regulations concerning the use of the name; that in so acting, not only did he commit disloyalty but he was ill-intentioned, given the fact that it is permissible to use the [trade] name in advertisements; and that he accused them of creating a Cuba like the one that existed before Castro.

9) The complainant based his assertion concerning the monopolistic tendency of Williams Hospitality Management, who is the owner of the Condado Plaza*, on information offered by them in an Arbitration Hearing concerning its 52% share of the gambling market in Puerto Rico casinos.

10) The correct figure, according to the Employer, is 50% and only for the month of August 1985, ". . . a month in which Condado Plaza's percentage rises above the average [. . .] because it is among the few, and at that time the only one, that does promotion of special groups in the summertime." (See Employer's Allegation, p. 57).

11) According to the report "Casino Operations Report", of the Puerto Rico Tourism Company, the Condado Plaza's proportion in the "*wins*"** of all*** the Puerto Rico casinos

*Williams Hospitality Management and/or Williams Electronics owns the Hotel Condado Plaza & Casino. Mr. Hugh Andrews presides over the former.

**"Win" is the income from the tables or what customers lose at the tables and is distinguished from the "drop" which represents the volume of chips sold (see Appendix 22).

***The number of casinos which were operating in Puerto Rico in fiscal year 1984-85 rose to 10 and increased to 14 in the following fiscal year (Company Exhibit 65b).

rose to 34.71% in fiscal year 1984-85. This percentage increased to 37.43% in fiscal year 1985-86. If we add 14.53% to this proportion corresponding to the San Juan Casino hotel and Palmas del Mar's 2.16% achieved in that same fiscal year, the share in the wins of the Puerto Rico casinos on the part of the Williams Hospitality company would amount to 53.97 of the total for that year. (Company Exhibit 65b).

12) The share of these three casinos rose to 63.87% of the "wins" of all the Puerto Rico casinos in the 1986-87 fiscal year, but went down 56.39% in the 1987-88 fiscal year when the Sands Hotel casino entered the competition that year. (Company Exhibit 65b).

13) The annual employment average in the Condado Plaza casino increased to 247 in fiscal year 1982-83 (a year before being purchased by Williams Hospitality Management). For fiscal year 1986-87, the average employment remained the same. On the other hand, the income for "wins" increased from $14.99 million in 1984-85*, to $19.69 million in 1986-87. (See Company Exhibits 65b and 70b).

ANALYSIS AND OPINION

In order to uphold its position that the dismissal was justified the Employer presents, in synthesis, the following arguments:**

> "Neither the Constitution of Puerto Rico nor That of the United States Protects under the Guaranty of Free Speech an Ill-intentioned Opinion Based On False Information Known By the Libeler Or Negligently Uncorroborated Which Damages the Reputation Of A Person, Which Has Constitutional Protection In Puerto

*No information provided us with regard to 1983-84.

**It is transcribed just as it appears in the brief.

Rico And Has Been Protected Under Common Law in the United States And interpretation Of The American Constitution. . . .

The Right To Petition Protected As Part Of United States Law And Section 4 Of Article II Of The Puerto Rico Constitution Does Not Enjoy Greater Protection Than Other Expressions Under Such Postulates And Equally Yield To The Right To Reputation In The Equitable Democratic Balance. . . .

The Dismissal Of Victor Villalba For Disloyalty Was Justified As The Only Reasonable Alternative For An Employer Who Has The Obligation To Protect The Smooth Running Of The Business, And Not Because of Caprice or Arbitrariness, under the Legal Criteria and Case Law of Act 80 of May 30, 1976, As Amended Until 1985 Since The Later Amendments Cannot Have Retroactive Effects Under Our Constitution. . . .

The Facts For Which Victor Villalba Is Dismissed Are Verifiable By the Arbitrator As False or True. . . .

The Union maintains, on the other hand, that the statements by the complainant, who was summoned by a Committee of the House of Representatives and before which he appeared in his capacity as President of the Union, are protected under the Constitution of Puerto Rico, specifically by Section 4 of Article II, which states that "no law shall be approved that limits freedom of speech or press or the people's right to gather in peaceful assembly and petition the government for the reparation of grievances" and by the First Amendment to the Constitution of the States *[sic]*, which provides in its pertinent part, that Congress ". . . shall approve no law . . . which restricts freedom of speech or press." Also, according to the Union, "it should be pointed out that the Political Code in its section 153 provides that a witness shall commit a misdemeanor if he fails

to appear or refuses to answer, after being summoned to testify or produce documents or both, in any matter under investigation before the Legislative Assembly or before a Joint Committee or any of the Houses. In the same manner, the witness who gives false witness before a legislative body shall be punished for perjury." Concerning the foregoing, the Union alleges that the statements made by complainant, specifically those concerning the monopolistic tendencies of Williams Hospitality Management, are founded on statistical data submitted by the company itself in an arbitration hearing to the effect that it monopolized 52% of the gambling in Puerto Rico casinos, to which would be added the percentage corresponding to the Hotel El San Juan casino, which was acquired by the Company. The Union alleges that "Said assertion, made in the interest of safeguarding the interests of all the employees of said industry and of *all* the members of his union, was not made in disregard to the truth nor was it a product of any injurious design whatsoever" and that it should take under account, also that at that time the Union presided by Mister Villalba grouped union members from the Condado Plaza and the Dupont Plaza. In other words, according to the Union, the statement on the monopolistic tendencies made by the complainant as President of the Union, with information provided by the Employer in an arbitration hearing, concerning Mr. Andrews, who is a "public figure", or concerning the Company, do not satisfy, under those circumstances, the criteria that the same was made "with knowledge that it was false or in reckless disregard for whether it was false or not", for it to be considered libelous.

The parties agree that the controversy of the complainant's dismissal should be focused in terms of the right to freedom of speech in contrast to the good name of a juridical or natural

person.* In other words, we must determine if Mr. Villalba's statements before the commission should be considered defamatory or not.

This focus is analogous to the one presented in labor-management arbitration when the arbitrator must decide if disciplinary measures should be taken when the employee who is the object thereof acts in his free time and out of the work place, in such a way as to damage his employer.

Reputed essayists Elkouri & Elkouri, in their book "How Arbitration Works" (4th edition, p. 657), cite arbitrator D. Emmet Ferguson to the effect that:

> *"While it is true that the employer does not [by virtue of the employment relationship] become the guardian of the employee's every personal action and does not exercise parental control, it is equally true that in those areas having to do with the employer's business the employer has the right to terminate the relationship if the employee's* ***wrongful*** *actions injuriously affect the business."* (our emphasis).

Note that one of the conditions that justifies dismissal is that the employee's actions *are incorrect*. It is not enough that his conduct damages the employer in one fashion or another; the condition that the conduct be incorrect must also be present. In the same way, then, it can be concluded that if the statements of the employer are libelous or defamatory, he may be subject to dismissal, which would also imply that the same are not protected by the right to free speech. In other words, in the labor-management relationship, defamatory statements, because they are incorrect actions, would entail dismissal.

*The parties in their briefs express themselves *indiscriminately* with regard to the person of Mr. Andrews and the company he directs. Nor do we make any distinction in this analysis between the natural and juridical person. In Federal, as in local, case law, corporations may sue for libel; (*Coop. de Seguros Múltiples de P.R. v. San Juan*, 274 F. Supp. 627 (1968)).

The difference between the arbitrators' usual approach and the constitutional balance between the right to free speech and the protection of a person's good name lies in the degree of proof that may be required when the person who is the object of statements, supposedly defamatory, is a "public figure". When he is so considered, federal as well as state case law agree that the proof must show that the statements were made with "actual malice, that is, that it was with knowledge that it was false or with the reckless disregard for whether it was false or not," 84 JTS 79 or, in the language of the United States Supreme Court, ". . . *that the statement was made with "actual malice", that is, with knowledge that it was false or with reckless disregard of whether is was false or not.*" (376 U.S. at 279-280).

Therefore, the first thing we must consider is whether Mr. Hugh Andrews, President of Williams Hospitality Management, Inc., is a public figure or not.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) the United States Supreme Court applied the criterion, established for public officers, to private persons ("not public") who are involved in the resolution of important public issues or who, by reason of their prestige, mold events in areas that concern society in general. The Court also ruled that the evidence required of the complainant is of the "clear and convincing" kind; not as in ordinary arbitration cases in which the criterion applied is of the preponderance of the evidence.

Similarly in Puerto Rico the Supreme Court ruled (84 JTS 79) that and we quote: "A person may become a 'public figure'—for purposes of the rule applicable in libel cases-involuntarily, having been invested with more community interest; the leaders and other outstanding persons of society are not the only people identified as 'public figures'; a private citizen may acquire the necessary notoriety so that the general welfare demands that the right to free speech and press be upheld." It also established the criterion of "clear and con-

vincing evidence" to determine if someone has committed libel or not: "In libel cases brought by a public figure, summary judgment should be entered in favor of the defendant if the complainant, through clear and convincing evidence and not with the mere assertion that the publication was malicious, does not demonstrate the existence of actual malice."

The courts have also established criteria to determine whether a person is a "public figure" or not. In *Michael Milkovich, Sr., Petitioner v. Lorain Journal et al., June 21, 1990*, the United States Supreme Court cites an earlier case, *Rosembloom v. Metromedia*, to the effect that:

> "*Public officials and public figures usually enjoy significally [sic] greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements that [sic] private individuals normally enjoy.*" *[More important] public officials and public figures have voluntarily exposed themselves to increased risks of injury from defamatory falsehood concerning them.*"
> (Additional quote is omitted)

The Puerto Rico Supreme Court, in 84 JTS 79, cites case *Torres Silva v. El Mundo, Inc.*, 106 D.P.R. 174 (1978) in that:

> "The rational grounds for the public—private person dichotomy generally enjoys [*sic*] more access to the media to refute the defamatory publication and counteract its effect, moreover, it is assumed that the public figure has voluntarily exposed himself to the risk of more rigorous judgement by the public." (Additional quote is omitted)

In our opinion, although the aforecited case law is better adapted to the circumstances of freedom of speech in its freedom of press modality, the same should apply with equal

rigor to the circumstances of a person who is summoned by a legislative committee to express his "ideas" or points of view in regard to what public policy or the legislation that manages such an important industrial sector of this society as tourism should be. Freedom of speech must be broad in that context in which guidance is sought in regards to a subject so complicated and full of uncertainty as is that of determining, among other things, the compatibility of a specific tourist development with the idiosyncrasy of our society. (see Explanation of Motives of H.R. 102).

Perhaps, even more than the press, a legislative committee is a market place of ideas where the ideas of one party are exposed to refutation or immediate review from the other, as in fact happened in this case in which the President of the Company enjoyed the opportunity of expressing his ideas or points of view after the Union President had stated his. Besides the legislative forum, the President of Williams Hospitality Management had at his disposal the country's press in which to refute the complainant's statements. The evidence presented during the course of the hearings shows the high-profile notoriety of the controversy and its participants Mr. Andrews and Mr. Villalba. We may conclude, then, that for legal purposes, the President of Williams Hospitality Management, Inc. is a public figure.

We must now determine whether the complainant's statements before the legislative committee, on November 5, 1985, which caused his dismissal, can be classified as libelous or not within the context of the legal principles outlined.

The Employer alleges in his letter of dismissal that the complainant accused him of violating antimonopoly laws. A study of the talk and the answers to the lawmakers' questions do [*sic*] not reveal, however, that the complainant has accused the employer of violating said laws. The tone and sense of his statements were rather more to the effect of revealing a marked *tendency* towards that end. Textually the complainant

expresses himself in terms of a "marked tendency"; that a "monopolistic *process has begun*". He does not assert that the Company is operating as a monopoly. In fact, in answer to a legislator's question, Mr. Villalba responds in terms of a monopoly "that is going to be created" (see page 41 of Company Exhibit 12). In other words, the tone and sense of the complainant's statements is that statistics reveal an increasing tendency towards monopoly; not that a monopoly exists.

Apart from this, we feel that in basing his assertions in regards to this tendency on percentage figures submitted by the Employer himself in an arbitration hearing, which are presumed to be correct, this does not warrant concluding that he has committed actual malice, that is, that he has acted with knowledge that the same were false.

It was not the complainant's obligation to painstakingly investigate whether the statistical data presented by the employer during an arbitration hearing were correct or not. Rather, it was the Employer's obligation to present seriously and not "foolishly" (the company's expression used in its written brief, page 57) the exact figures before the arbitration hearings. As the Company did not show us that the complainant, in making his statements before the Committee, had knowledge of the exact figures, we cannot conclude that he acted with reckless disregard for the truth.

Besides, the use of the term monopoly by the complainant, under the circumstances of the case, may be described as a "rhetorical hyperbole", a "vigorous epithet"* made more to attract the legislators' attention to the fact of the tendency revealed by the statistics in that movement without it constituting an expression of libelous nature. It could also be seen as an effort to reconquer, through legislation, privileges or rights lost at the negotiating table, such as the reduction of the half hour for recess. In other words, we cannot conclude, on the basis of that phraseology, that the Employer is being accused

*Concerning these terms see following quote.

of violating antimonopolistic laws. Compare in this respect the United States Supreme Court's opinion in *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler,* 398 U.S. 6 (1970) in regards to the use of the term "blackmail" as a "rhetorical hyperbole" that does not imply, under the circumstances of that case, an accusation that the complainant was engaging in that type of conduct.

Another accusation made by the Employer to the complainant in the letter of dismissal is that "knowingly provided false and misleading information about job reductions in our company".

The complainant's information regarding job reduction has to do with an estimate based on the new formula of 20 minutes of rest for each hour worked which replaced the former one of 30 minutes for each hour. According to the complainant and we quote: "The purpose of this measure is no other than to operate the casinos with less personnel. Which represents, according to our estimates, a reduction during the off season of more than 100 jobs on the Island."

As we see it, said statement cannot be classified as libelous and is protected by the right of free speech, according to case law. Note that the estimate made by the complainant is based on the hypothesis that the formula introduced by the Employer has the purpose of increasing the employee's productivity. It is not disloyal for a worker to question such "innovations" on the basis that they tend to create unemployment, given that with a smaller number of employees the same amount of work can be performed. The hypothesis, of course, assumes* that the market or demand will remain the same, for an increase in

*The fact that demand increases may nullify the hypothesis, as apparently happened in this case. Nevertheless, it is usual between economists and labor leaders to keep other variables equal when they are going to calculate the effect of one in particular. When making his estimates, apparently, according to the statement (supra) he went by his perception of "a growing degree of economic constriction and precariousness within that industrial section."

the production per employee may entail a decrease in its number. To postulate such hypothesis does not constitute, as we see it, a libel when one of the objectives of good management is precisely to offer more and better service or product with the expenditure of a lower amount of resources.

On the other hand, the fact that the estimate of a job reduction was not confirmed, in this case, by the statistical data, does not lead to the conclusion that the complainant acted with actual malice or with reckless disregard for the truth. It is our opinion that if a citizen had to guarantee the veracity of his estimates concerning the subsequent tendency of an economic variable before a committee of the legislature, or before any forum, possibly not even the economists would venture to exercise the right to speak before said forums. In other words, such a condition or exigency would eliminate the free flow of ideas.

Another accusation made by the employer against the complainant related with the defamation or libel, is that he accused him of having violated the rules and regulations of gambling by reason the "trade name" Condado Plaza Hotel & Casino ("you accused us of violating the gaming law and regulations by using our trade name . . ."). We have scrutinized the statement (supra) and the records of the Committee's hearings and we have not been able to verify that he made the statements that he is charged with. Given that in this type of case, the weight of the evidence falls on the Employer, we are proceeding, with no further analysis, to dismiss the accusation.

Nor does it require too much analysis to dismiss the one related to the complainant's alleged accusation against the Company of creating a Pre-Castro Cuba (". . . *How can you charge us with creating a pre-Castro Cuba . . .?*"). The record of the hearing does not reveal that he made such an accusation against her employer. The complainant's statements referred at that point to a question from a lawmaker in regards to whether the "institution" of the "*junkers*" benefited Puerto Rico. To

such a statement the complainant responded in the following manner:

> "Well, you have to take and analyze it from several points of view. For example, we either create in Puerto Rico a '59-style Cuba or a 50's-style, that only devoted itself to gambling and this brought about social problems. Are we going to create something like that in Puerto Rico? Or are we going to create the kind of Tourism where the citizenry will not be affected and the government itself will not be affected? Because if we develop gambling like in Atlantic City and Las Vegas, we are going to have some immediate social problems. Then the government is going to have to deal also with the situation because crime will increase, like it increased in Atlantic City; drug trafficking will increase like it increased in Atlantic City. . . .
>
> Now, what concerns me is that tourist promotion be exclusively to bring in gamblers to Puerto Rico."

In our opinion, such statements from the complainant respond to the purpose for which he was summoned before the Committee, that is, to propitiate a re-evaluation of the Tourist Industry ". . . with the aim of seeing which legislative measures or administrative measures could be adopted . . ." We understand, then, that the same represent ideas that fall within the area of the permissible and desirable in a field where alternate possibilities of public policy are discussed. We cannot, therefore, classify such a point of view as defamatory or libelous. To so classify it would constitute an unnecessary impediment to the complainant's freedom of speech and to the lawmakers' right to become informed of alternatives of the development of an industry which is of fundamental importance in the creation of jobs. Regarding this we should mention that the Puerto Rico Political Code in Section 153, provides that a witness shall commit a misdemeanor by failing to

appear or refusing to respond after being summoned to give testimony or produce documents or both, in any matter under investigation before the Legislative Assembly or before a joint committee or of either of the Houses.

Other accusations that the Employer makes against the complainant in the letter of dismissal of November 30, 1985, have more to do with alleged disloyalty than with libel. Specifically, it accuses him of questioning the aid that the government offered them (*"questioning government aid to us"*); of challenging sound legislation and regulations sponsored by them that advanced gaming (*"challenging sound legislation and regulations to promote gaming sponsored by us"*); discouraging local patronage that maintains our casino during the off season (*"fostering discouragement of local patronage that maintain* [sic] *our casino during the off season"*); opposing the promotion of players from the United States to play in its casinos (*"opposing our promotion of U.S. players to come to play in our casino"*). All the aforesaid by the complainant, according to the Employer, is contrary to the best interests of the business that employs him and even to the interests of the workers that he represents as a union leader. (*"your rights have to be in balance with the interests you represent and with your loyalty to the Company that hires you. Your conduct clashes with both duties"*).

In the written brief on the merits of the complaint, the employer states the controversy in the following manner:

> "A name is being sold . . . and experience is being sold—Any action that tarnishes that name and that experience affects the product being sold. But when the action does not stop with only discrediting the product but rather intervention is sought to prevent that such product continues to be sold, the disloyalty of the employee who so propels it is clearly obvious." (emphasis in the original, p. 38).

The employer proceeds to cite case law, especially from the National Board of Labor Relations, with the aim of showing that the complainant's alleged disloyal conduct is not protected by the statutes that regulate collective bargaining.

It is our opinion that the circumstances or situations which make up disloyalty in said cases is *[sic]* not comparable to the situation of facts in the case under our consideration. Disloyalty, in the cases cited, is related to the discrediting of the service or the product of a specific employer and not with statements about the promotion of a public policy applicable to the entire industry or all the competitors. An example of this is the case of Jefferson Standard Broadcasting Company, 94 NLRB 1507, enfd. 346 U.S. 464 (1953) in which a publication caused the employer to become involved in a loss of income (by advertisements) due to the dissatisfaction with their programming service. In that case, the Board states that in regards to the publication:

> *". . . the gist of the appeal to the public was that the employer ought to be boycotted because he offered shoddy product to the consuming public . . ."* (Emphasis ours).

In our case, the complainant does not affirm or declare that his Employer is offering a coarse service or one of doubtful quality in its casinos. On the other hand, the alleged disloyal statements that the Employer charges the complainant with, as we have already mentioned, are in relation to what the public policy should be, applicable to the tourist industry and the casino business in general. It does not refer to a particular employer or company in (except as to the monopolistic concept, already analyzed in another context) but to public policy regarding all the casinos, that is, the industry as a whole.

The fact that the complainant made the recommendations on public policy, or in general terms, prevents us from categoriz-

ing them as disloyal in the restrictive and usual sense of that concept (public denunciations about an employer's service or product, coarse or of doubtful quality, etc.). On the other hand, to think of the recommendations with respect to the governmental policy applicable to the industry in general as disloyal would constitute a limitation, not only as to the complainant's freedom of speech as a union leader and a citizen, but to the legislature's right to be informed from one whom it deems capable of doing so. With regard to the latter, read Honorable Representative Rivera Morales's statements during the questioning session once the complainant had ended his talk. (Company Exhibit 12, pps. 52-54).

Concerning the Employer's specific accusation that the complainant questioned governmental aid to "them", we can repeat the foregoing, that the concept of disloyalty cannot be invoked, applicable to a specific employer, when the government policy that is promoted applies to the entire industry, unless said concept, which has a restricted or relative sense in the National Board of Labor Relations case law, is generalized in an absolute manner to everything that concerns the employer *indirectly* or remotely. Apart from that, it is our opinion that the plaintiff's petition is related to legitimate interest (well-founded or not) that the aid or loans be given to the employers on the condition that they not take away benefits already acquired by the workers (see Company Exhibit 12, p. 47) such as the "croupiers" half hour rest for each hour worked. It is our understanding that said statement is also protected by the Board's statute related to legitimate concerted actions.* The fact that the petition is made before legislative

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*We cite the following statements of the plaintiff before the Committee:

"That for ten minutes the employers have maintained intransigent attitudes, that all it has cost is work. And here we are, not to reduce jobs, but to guarantee more jobs. *And if they are giving* all those benefits we feel *that some benefit* should be *given to the workers* in this Country," (Company Exh. 12, p. 55).

committee and not on the negotiating table, does not limit, to our understanding, said right.*

Concerning the recommendations made by the complainant (new orientations of publicity to attract the middle class in the United States instead of professional gamblers; the restoring of the dress code to enter a casino) all of them, to our understanding, fall within the frame of debatable ideas as such, that is, subject to confrontation in the "market place of ideas". To call them disloyal or defamatory would tend to unnecessarily restrict the right to free speech, to the free flow or "commerce" of ideas, as is conceived by the Honorable United States Supreme Court, in the cited case.

We emphasize that the fact that a labor leader disagrees with his employer as to what the government policy should be in the Tourist industry and the casinos cannot be categorized as disloyal nor defamatory unless absolute loyalty is claimed. We feel that loyalty, as well as the freedom of speech, also have a limit that, according to what arises from Board's cases presented by the employer in his written brief, is circumscribed to the Employer's good name and the service he offers.**

Wherefore, we conclude that complainant did not commit any violation that merits disciplinary action when making the statements before the Committee, nor any act of disloyalty punishable against his employer. In tone with this, we issue the following:

AWARD

The dismissal of the complainant, Mr. Víctor Villalba, was not justified. The Employer is ordered to reinstate him immediately to his job and to pay of all unearned wages, pursuant to the provisions of the Agreement.

*The law, as our highest Court has ruled, is part of the collective bargaining agreement.

**Apart from the disloyal competency which is not mentioned in this case.

ISSUED in Hato Rey, Puerto Rico, on March 8, 1991.

[signed] J RODRIGUEZ
JUAN T. RODRIGUEZ
Arbitrator

JAR/ems

CERTIFICATION

Filed in the record, this 8th day of March, 1991; a copy is this same day being mailed to the following persons:

1) Atty. María Milagros Soto
McLeary Ave.—22 Yardley Place
Suite 200, Ocean Park
Santurce, Puerto Rico 00911

2) Mr. Carl Kortum
General Manager—Casino Division
999 Ashford Avenue, Condado
San Juan, Puerto Rico 00902

3) Atty. José E. Carreras
Cond. Midtown—Office 206
421 Muñoz Rivera Avenue
Hato Rey, Puerto Rico 00918

4) Mr. Víctor Villalba, President
Puerto Rico Casino Workers Association
2169 Loiza Street (1st. fl.—Int.)
Santurce, Puerto Rico 00913

[signed] Elisa Mirabal
Elisa Mirabal—Secretary

United States District Court
For the District of Puerto Rico

—CERTIFED—

To be a correct translation prepared by,

(illegible)
Certified Court Interpreter 6/23/92
Administrative Office of the
United States Courts

APPENDIX—(iii)

CERTIFIED TRANSLATION

IN THE SUPREME COURT OF PUERTO RICO

CONDADO PLAZA HOTEL & CASINO,
Plaintiff-Respondent,

vs.

CASINO EMPLOYEES ASSOCIATION, *et al.*,
Defendant-Petitioner.

CE-91-690 Review

RULING

San Juan, Puerto Rico, February 21, 1992.

The preceding motion for reconsideration is denied.

Agreed to by the Court and certified by the General Clerk.

(Sgd.) Francisco R. Agrait Llado
General Clerk

United States District Court
For the District of Puerto Rico
—CERTIFIED—
To be a correct translation prepared by
Daniel Tomlinson 5-12-92
Certified Court Interpreter
Administrative Office of the
United States Courts

APPENDIX (iii)(2)

CERTIFIED TRANSLATION

01 of 01

COMMONWEALTH OF PUERTO RICO
GENERAL JUSTICE COURT
SUPREME COURT

CONDADO PLAZA HOTEL & CASINO,
Petitioner,

VS.

CASINO EMPLOYEES ASSOCIATION, *et al.*,
Respondent.

CASE: CE-91-0690 ORIG. CASE: KAC91-0543
CIVIL ACTION
CIVIL ACTION OR OFFENSE

SOTO CASTRO MARIA M
22 YARDLEY PLACE SUITE 200
OCEAN PARK
SANTURCE, P.R. 00911

RECEIVED
FEB 26, 1992

NOTIFICATION

I CERTIFY THAT IN REGARD TO THE MOTION FOR RECONSIDERATION THE COURT ISSUED THE ATTACHED RULING.

CARRERAS ROVIRA JOSE E-MIDTOWN BLDG. OFFICE 206-421 MUNOZ RIVERA AVE.

SAN JUAN, PUERTO RICO, FEBRUARY 24, 1992

FRANCISCO R. AGRAIT LLADO
GENERAL CLERK
(SGD.) DEPUTY CLERK

United States District Court
For the District of Puerto Rico
—CERTIFIED—
To be a correct translation prepared by
Daniel Tomlinson 5-12-92
Certified Court Interpreter
Administrative Office of the
United States Courts

APPENDIX (v)(a)

[Cover Sheet and Index Have Been Suppressed]

CERTIFIED TRANSLATION

IN THE

SUPREME COURT OF PUERTO RICO

CONDADO PLAZA HOTEL & CASINO,

Respondent-Petitioner,

vs.

CASINO EMPLOYEES ASSOCIATION; CONCILIATION AND ARBITRATION BUREAU AND/OR JUAN T. RODRIGUEZ,

Complainant-Respondent.

CIVIL NO. C-91-690

RE: REVIEW (REVIEW OF AWARD REGARDING DISMISSAL OF VICTOR VILLALBA)

PETITION FOR REVIEW

BEFORE THE HONORABLE SUPREME COURT:

Comes now the respondent-petitioner Condado Plaza Hotel & Casino, hereinafter referred to as Condado Plaza, and through its legal representation that signs below very respectfully requests the review of the Judgment of the Honor-

able Superior Court Judge, Angel F. Rossy García, in Civil Case No. KAC-91-0543.

(I)

JURISDICTION OF THE COURT

The jurisdiction of this Honorable Court to hear this appeal is derived from Article V, § 3 of the Constitution of the Commonwealth of Puerto Rico, and from Articles 7 and 14(d) of the Judicature Act, 4 L.P.R.A. §§ 35 and 37(d). This is a matter of an arbitration award reviewable under Rule 53 for Civil Procedure and Rule 17 of the Supreme Court Regulations under the doctrine legally set forth in *J.R.T. v. N.Y. and P.R. S/S Co.*, 69 D.P.R. 782 (1949), and its offspring. The Collective Bargaining Agreement in force between the parties at the date of the facts provides, in Article V of Complaints and Grievances:

> "8. The decision of the arbitrator shall be final and binding for the contracting parties as well as for all of the employees covered by this collective bargaining agreement *provided that it is in accordance with the law.* The determinations of fact shall be conclusive, *except for the question of procedural or substantive arbitrability, which shall be resolved in the first instance by the Arbitrator but may be subject to judicial review.*" (emphasis added)

This is a case that is a sequel to the administrative action proscribed in the Judgment of the Honorable Judge Wilfredo Alicea on August 21, 1991, presently before the consideration of this Honorable Court in Case No. CE-91-616 in Review of the first germane award with the same date as this appeal.

(II)

JUDGMENT WHICH REVIEW IS BEING SOUGHT

We are requesting the Review of the Judgment of September 25, 1991 issued in the case of Civil No. KAC-91-0543 by the Superior Court Judge, Angel F. Rossy García, a copy of which was filed in the case record on September 26, 1991. (Appendix I) Said Judgment confirmed an Arbitration Award issued on March 8, 1991 by Arbitrator Juan T. Rodríguez of the Conciliation and Arbitration Bureau of the Puerto Rico Department of Labor and Human Resources, hereinafter referred to as the "Bureau," that was entered in the case record on the same date. (Appendix II)

(III)

SUMMARY OF THE FACTS

The relevant facts for the judge to evaluate this case go back to October of 1984. On the 31st day of that month the collective bargaining agreement expired between the Casino Employees Association of Puerto Rico, (hereinafter referred to as the Union"), and Condado Plaza, successor employer that had acknowledged the Union as a representative but proposed to renegotiate some of the rights granted by the prior employer in the agreement that was expiring, all of that directed at preventing that hotel, which had already gone bankrupt five times before, from following the same route. Condado Plaza assumed a firm negotiation position to recover part of the unproductive time granted to the employees although was willing to financially compensate such recovery of productivity. The Union assumed a position of not giving up any right previously acquired even if it was the first agreement between

the parties, according to what was sustained by the numerous news items in the country's press, submitted in evidence to the Arbitrator.

On November 5, 1984 the Association withdrew one of the 5 clauses agreed to in more than 1½ months of negotiation, making evident their strategy of delaying the negotiation until the Christmas season to declare a strike, as it had in fact declared with the prior employer in the 1981 agreement. In order to try to reach an agreement before the season in view of the union attitude, Condado Plaza was forced to declare an employer lock-out of the casino's employees that lasted 107 days.

While they were picketing, Mr. Víctor Villalba (then Vice-President of the Association) and his attorney, Atty. Jaime Cruz, repeatedly charged Hugh Andrews, President of the firm of Williams Hospitality Management Corporation that managed the Condado Plaza, with having committed several crimes; such as: violating the Games of Chance Act which is a penal statute, unduly influencing the Tourism Company and the Legislature, and monopolizing gambling in Puerto Rico, as the record submitted in Arbitration shows. Andrews never answered these defamatory statements in the press.

Condado Plaza prevailed in its demands for productivity and the Union in its financial demands. As a result, the Union accepted an increase in the workday of seven hours to 7:20 hours; the exclusion of the period for having meals which unexplainably was paid as time worked; and a change in the scheduling of active shifts at the table. Before, a croupier used to work 1 hour at the table, would rest half an hour, which within a 7 hour work day, that included a meal time of half an hour, allowed a croupier to work only five hours while he rested two. Condado Plaza obtained the shifts observed in other jurisdictions such as Atlantic City, Nevada and from before in Puerto Rico; shifts of one hour active work at the table, and a 20 minute rest, which with the increase of 20

minutes in the day shift, allowed the Management a yield of 6 hours of work and 1:20 hours of rest without counting the period for meal time that was not being paid now. It also granted the Union a 4 day work week and 3 days of rest that cost the employee 12 days of productivity per employee per year; and the partial reduction of the number of days of sick leave and vacation leave, and the misuse of unpaid leave.

The agreement was signed on February 22, 1985, putting an end to the controversies between the parties, in theory, in accordance with public policy that voluntary collective negotiation fosters industrial peace for the three years of its force and effect.

On February 28, 1985 the Legislature of Puerto Rico approved Joint Resolution 102 that ordered a study of the tourist industry. (Appendix III) Among the areas of study, the Legislature gathered Villalba's charges of monopolistic tendencies on page 2. The Legislative Assembly held public hearings summoning, among others, Mr. Villalba, then President of the Union and Mr. Hugh Andrews to testify.

Villalba was an employee for the casino in the capacity of croupier. To be absent from work, he asked for permission from the Director of Human Resources to testify about the development of tourism, and was granted leave. But . . . there at the Legislature, in the presence of Mr. Andrews, Villalba directed his entire report to the accusation of a specific company, Williams Hospitality, from the second paragraph of his dissertation. (Appendix IV) Andrews believed that Villalba was abusing his constitutional right to freedom of speech, taking advantage of the influential public forum, in charging him with the commission of a crime, providing recognizably false data in at least 13 items that are discussed in Appendix V, *infra*, and attacking the concessions that voluntarily in exchange for other benefits he had granted at the bargaining table. Andrews believed that in order to offer his points of view on the development of tourism, Villalba did not have to

launch an attack on his present employer, humiliating him in front of the audience that had attended. This second round of accusations was this time considered, not as a result of a heated labor dispute but rather as a malicious revenge; or at least gross negligence intended expressly to causing harm to Williams Hospitality and to make the public hate it. On November 30, 1985, Andrews dismissed Villalba for malicious damage to his reputation, for disloyalty, and interference with the proper operations of the business (Ap. VI)

On December 6, 1985, Villalba appeared before the country's press and on television, and before the Legislature on January 30, 1986 and April 8, 1986 sustaining the false charges made against his Employer. As a result of his statements:

a. Williams Hospitality was denied the license for operating the casino at El San Juan, according to what was proved by the ex-Secretary of the Treasury, Manuel Sarmiento, who appeared as a witness, being Vice President of Banco Popular at the time of his testimony.

b. Williams Hospitality was subjected to legislative investigations that culminated in several bills to impose taxes on all concessionaires that controlled more than 50% of the gambling, limiting the number of licenses that may be authorized to them.

c. The Legislature presented several bills to criminally penalize the employer, which did not became law but House Bill 712 become law, which amended the Severance Pay Law to prospectively prohibit the dismissal of an employee for statements in the Legislature, in which the court a quo relies on in spite of the fact that such was not the state of the law at the time of the employee's dismissal. (Appendix VI).

d. The permanent financing of the Hotel San Juan was delayed for almost a year when the casino license was first denied; and then when the Treasury conditioned it to the investigation of monopoly, because the investors did not want to run the risk of investing their money if the hotel did not have a casino to make the operation financially feasible.

There were real mediate and immediate damages caused by Villalba to his employer that are evident in detail in the extensive record and whose evidence, neither the arbitrator nor the Court consider respectively in the award that we consider invalid and in the erroneous judgment at bar.[1]

On May 25, 1990 the jurisdictional controversy over substantive arbitrability and disqualification (CE-91-616) was submitted. On July 31, 1990 we filed the briefs on the merits of the dismissal, without submitting ourselves in the submission agreement to the jurisdiction of the Arbitrator, but forced by the arbitrary Resolution of the Arbitrator to continue with the case *ex parte* without giving us the opportunity of requesting judicial review over the determination of arbitrability that we expressly reserved in the collective bargaining agreement. We submit a summary of the evidence as part of the briefs that we filed in the arbitration forum. (Ap. V)

The awards for one case and another were issued on the same date. Being a matter of an unusual controversy in arbitration procedure, we consider that judicial review was in order—not only in the case of the first award in which we reserved the right to complete judicial review over the jurisdictional and procedural aspect—but also in the second case

[1]Other facts related to Case No. CE-91-616 arose that we will not repeat here due to limits on the length of the brief but that are intrinsically related to the invalidity of the judgment and award of this case since the Arbitrator and Bureau were legally enjoined from resolving that the dismissal of the complainant was justified, according to what is argued therein.

due to the complex conflict of constitutional rights present that had not been resolved even at the level of the United States Supreme Court. Therefore, on April 8, 1991 we filed two petitions for review in the Superior Court that were assigned to two different courtrooms in spite of our request that both of them be assigned to the first court because the two controversies were too interrelated. We are enclosing a copy of the petition related to this case (Ap. VII) inasmuch as the first controversy is already duly documented in case CE-91-616.[2]

On August 21, 1991 the Honorable Judge Wilfredo Alicea issued judgment in the first case providing:

> "Consistent with the prior exposition, the Court issued the following judgment:
>
> > "a. It is decreed that the Arbitrator, Juan T. Rodríguez as well as the Conciliation and Arbitration Bureau of the Department of Labor and Human Resources, *must abstain from deciding the complaint on its merits, except for any stipulation to the contrary by the parties.*
> >
> > "b. The writ for review is denied as to the remaining assertions of errors, leaving the arbitration award in force."

On September 10, 1991 we raised a copy of the Judgment to the Honorable Angel F. Rossy, through an Informative Motion and Motion Requesting a Resolution that the award issued by the Arbitrator in transgression to what had been ordered was invalid *ab initio*. (Ap. VIII) Inasmuch as the Supreme Court had not decided anything and the term to request the review of

[2]We respectfully suggest that this High Court should consider Case CE-91-616 together with this petition for integral analysis of the particularity of this case, that marks it as an exceptional one outside of the normal procedure that is followed by the impugning and review of awards.

the Judgment of Judge Alicea was close to expire, we filed our writ for review before this Honorable Court on September 25, 1991.

On that same day, September 25, 1991, Judge Rossy sustained the validity of the award, without any acknowledgement of the Judgment that enjoined both the Bureau and Arbitrator Rodríquez from intervening in the decision on the merits of the dismissal.

(IV)

ASSERTION OF ERRORS

1. The Court erred in its appreciation that the general doctrine on arbitration and *UGT v. Challenger, infra.*, applied.

2. The Court erred in not applying the standard of review of *Sonic Knitting Industries, infra,* when a substantial question was being raised as to rights under the Constitution of Puerto Rico and the Constitution of the United States and case law precedents in the subject.

3. The Court erred in confirming an award contrary to law that involves a substantial controversy of constitutional law that erroneously decided that:

> a. the statements at the Legislature were protected by the right to freedom of speech because they were not defamatory in spite of their being libel *per se,*
>
> b. Mr. Hugh Andrews was a public figure,
>
> c. the same standard applies to the determination of libel and defamation as the one applied in arbitration when an employee acts off duty in his free time and outside of work in violation of the rules of conduct

without considering that said act affected the proper operation of the employer's business,

e. it is necessary to establish actual malice in this case.

f. it is not the same to charge monopoly (this would be libelous) as to charge monopolistic tendencies (not libelous).

g. it is not an obligation of the deponent to verify the correctness of the data that he supplied as true to the Legislature in spite of the fact that he was requesting legislative action to affect a third party based on that date.

4. The conclusion of law that the dismissal of Mr. Victor Villalba was not justified is contrary to the clear letter of Article 2 of Act Number 80 of May 30, 1976, as amended and the governing case law in the field; the Court also erring in its retroactive interpretation and application of the amendment to the Law.

5. The findings of fact are not substantiated by the evidence on the record as a whole which constitutes an error of law.

6. The Court commits an error in not reviewing an award that contrary to law determines that the labor doctrine elaborated under the National Labor Relations Act on disloyalty that discredits the service or product of the employer as just cause for dismissal does not apply.

(V)

ARGUMENT OF THE ERRORS

Neither the General Doctrine on Arbitration nor the case of UGT v. Challenger, infra, Apply in View of the History Sustained by the Substantial Evidence in the Record.

The court of instance concluded erroneously, citing *UGT v. Challenger,* 90 JTS 43, that when the parties have chosen to submit their controversies to arbitration, they have substituted the Courts by the Arbitrator, for which reason they cannot relitigate the case in the Courts. [pp. 3, 4] It loses sight that, according to its own determination of fact and of law, p. 3:

> ". . . the collective bargaining agreement between the parties conditions the finality of the Award to its resolving the controversies IN ACCORDANCE WITH THE LAW, which authorizes the parties to go before the judicial forum to challenge the Award issued, not only as far as the traditionally recognized causes of invalidity, but also to review the correctness and judicial validity of the Award issued. *Sonic Knitting Industries v. I.L.G.W.U.*, 106 DPR 557 (1977); *UIL de Ponce v. Dest. Serrallés, Inc.*, 116 DPR 348 (1985).

In this case, the parties substituted the Arbitrator by the courts *only* on the condition that its award would be in accordance with the law whereby it would not be a total waiver. If the award is not in accordance with the law, it *is not final.* The Court should have determined whether the errors of law asserted had grounds before giving the deference to the controverted award that it erroneously extended to it under the general doctrine that is not applicable in the case of record. The Court did not consider that the employer was arbitrarily forced by the Arbitrator to arbitrate the merits of the complaint under penalty of having the case go forward *ex parte*, in spite

of the fact that the agreement also reserved to the Court the finality of a *bona fide* controversy of substantive arbitrability that had been previously raised before the Arbitrator, both in the determinations of fact and of law; that the Arbitrator refused the right to contractual judicial review and that the employer NEVER SUBMITTED ITSELF to the jurisdiction of the Arbitrator on the merits, which was argued in the Petition for Review and Memorandum of Law.

The Superior Court also knew that this case was a sequel to another one in which serious germane issues that had been raised to another Courtroom, regarding disqualification, violation of the constitutional rights to due process of law and of impropriety in the conduct of the Arbitrator, which are recognized causes for impugning. We are attaching hereto, for easy reference in the analysis of this case an excerpt of the summary of facts in the Case CE-91-616 that dramatizes the uniqueness and exceptional nature of the case. (Exh. A.)

The Court was timely informed {AP. VIII} that another Judge had found in the case from which the one that was under his consideration stemmed, that the disqualification of the Bureau and of Arbitrator Rodríguez were in order, in order to pass judgment on the merits of the dismissal was in order although the grounds for disqualification did not invalidate the award on the substantive arbitrability because it was of a procedural nature.

The Court Erred in not Applying the Standard of Review of ***Sonic Knitting Mills, infra,*** *when a Substantial Question was Being Raised as to Rights Under the Constitution of Puerto Rico and the Constitution of the United States.*

Since 1949, in accordance with the case of *J.R.T. v. N.Y. and P.R. S/S Co., supra,* when the collective bargaining agreement, the submission agreement, or a statute provides that the Arbitrator should render his award pursuant to the law, he is forced to follow the rules of law and issue his awards in accordance with the prevailing legal doctrines, granting this

Honorable Court the standing of full judicial review in such cases. If there were any doubt about extending judicial review to these cases, this Forum clarified it in *Sonic Knitting Industries v. I.L.G.W.U.*, 106 DPR 557 (1977); *UIL de Ponce v. Destilería Serrallés*, 116 DPR 348 (1985). The clear doctrine today is that the function of the Arbitrator that is required by the parties to decide in accordance with law is analogous to that practiced by a sentencing court of first instance, whereby the appellate forum is authorized to review the issues in that regard and judge the correctness and validity of the award. The Court *a quo* did not comply with its judicial task whereby it is in order for the Judgment to be revoked.

The Court Erred in confirming an Award Contrary to Law that Involves a Substantial Controversy of Constitutional Law.

The right to freedom of speech was consecrated in Article II, § 4 of our Constitution; and the right to reputation was elevated to constitutional rank in 1952, Article II, § 8. Said protection has been recognized in actions of libel both of a civil nature and of a penal nature in our system. *Pueblo v. Pérez Casillas, infra.* The equilibrium of these rights is maintained without deterioration or harm provided that good use is made of the right of freedom of speech and it is not abused, which this High Court set down in *Pueblo v. Pacheco Padró*, 58 D.P.R. 737 (1941).

Neither our constitution nor that of the United States protects under the guarantee of freedom of speech any ill-intended opinion based on facts known to be false by the defamer or negligently not corroborated that damage the reputation of a person, who has constitutional protection in Puerto Rico and has been protected under the common right in the United States and interpretation of the American Constitution. In the case of *Milkovich v. Lorain Journal Co.*, 58 LW 4846 (1990), the Federal Supreme Court established that the constitutional privilege does not extend to an "opinion" as part of the

guarantees of the First Amendment—that was what the Arbitrator and the Court extended protection to.

The individual right to a reputation imposes itself over the right to freedom of speech—even when the press is involved—except when the criticism or defamation is directed towards public officials, in which case another trend covers it stemming from the interest of the citizenry in monitoring officials who must be accountable to public processes. *Pueblo v. Rodríguez Hernández*, 86 D.P.R. 660 (1962). We rest on *Pueblo v. Rodríguez*, 38 D.P.R. 666 (1928) and on *Pueblo v. Quintana*, 39 D.P.R. 202 (1929), on the requirement of evidence of malice.

The charging of a crime is libel *per se*. The record demonstrates that the crimes of violation of the Games of Chance Act were charged, that the Arbitrator says the he could not locate in the file; violation of the monopoly law; and influence peddling in the Department of Games of Chance, that according to Villalba was run from the Condado Plaza; and in the Legislature itself, which we shall identify in the brief. If the statements are not true, which they were not in the great majority, they are also defamatory. The Arbitrator had to pass judgment on the veracity or falseness of the statements . . . without Villalba placing him in a condition to resolve them in his favor, as evidenced by the record. We rest on *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568; *Herbert v. Lando*, 441 U.S. 153 (1979); 50 Am Jur 2d, § 455.

In order that the defense of the truth may prosper in a trial for libel, the accused has to show not only that the fact is true but also that the publication was made with good intentions and for justifiable purposes. *Beauharnais v. Illinois*, 343 U.S. 250 (1952). In *Pueblo v. Prensa Insular*, 69 D.P.R. 683 (1949), it was said that: "When the committing of facts constituting a crime is charged, libel is prosecutable per se." *Mulero v. Martínez*, 58 D.P.R. 321 (1941). It is worth pointing out, that

in accordance wit the ruling doctrine, Villalba committed libel in other particulars—although he isn't charging a crime in the light of *Bosch v. El Imparcial, Inc.*, 87 D.P.R. 285.

Villalba had to demonstrate the truth of the facts, having charged three crimes; and he did not do so. The Arbitrator did not have the exculpatory evidence before him. The Court erred in confirming the Award.

On the other hand, the right to petition protected as part of the freedom of speech of the first amendment of the Constitution of the United States and § 4 of Article II of the Constitution of Puerto Rico does not have greater protection than other statements under such postulates and likewise give way to the right to a reputation in the democratic justice scale. The above-mentioned doctrine is not changed by the fact that libel may have occurred in the Legislature, as decided by this Court when it heard the events of the Cerro Maravilla. *Pueblo v. Pérez Casillas*, 117 D.P.R. 380, 1986.

> "We decide that it constitutes perjury, punishable under Article 225 of the Penal Code in force . . . to testify before a legislative Commission about the certainty of an essential fact, knowing it to be false.
> "The protection does not extend to perjured testimony. U.S. Applebaum, 445 U.S. 115 (1980)."

The case refers to the legislative immunity of a deponent who requests it. See *Pueblo v. Bernard*, 32 D.P.R. 858 (1924).

In *McDonald v. Smith*, 105 S.Ct. 2787 (1985), it was decided that: "there is no sound basis for granting greater constitutional protection to petitioning than to other First Amendment expressions."

> See: *Bagley v. Iowa Beef Processors, Inc.* 737 F. 2d 632 (1986); 50 Am Jur 2d, p. 705, 734; *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972); *D. & B. v. Greenmoss Builders, Inc.*, 53 LW

4866, (1985); *Connick v. Myers*, 461 U.S. 146; *PRHA v. Nogueras*, Civil No. 79-736 (1979); *Hernández Agosto v. Ortiz Montes*, 115 D.P.R. 564 (1984); *Romero Barceló v. Hernández Agosto*, 115 D.P.R. 368 (1984); *Peña Clos v. Cartagena Ortiz*, 114 D.P.R. 576 (1983).

A corporation can be slandered, since it is recognized as a person. There is no doubt that a corporate body has its credit and prestige that must be protected; and for that reason, it can undertake an action for libel or calumny with respect to its business, credit, officers, stockholders or employees when they suffer damage. It has likewise been sustained that a corporation can recover for defamation that offends its financial position, its methods of business, or when it is accused of fraud, a crime or bad management. Santiago, *Id.* 328; 33 Am. Jur., § 193, p. 183. We rest on *Coop. de Seguros Múltiples de P.R. v. San Juan*, 294 F. Supp. 627 (1968); *Las Monjas Racing Corp. v. PR Ilustrado, Inc.*, 58 P.R.R. 930; *Rosado v. Fluor International*, 81 P.R.R. 592 (1959); *Jiménez v. Díaz Corujo*, 14 P.R.R. (1908); *Pueblo v. Colberg*, 24 D.P.R. 673 (1911).

See "American Jurisprudence" [50 Am. Jur. 2d 497, *Libel and Slander*, pp. 497-781; *Owens v. Scott Publishing Co.*, 84 p. 2d (*sic*) 296 cert. den. 350 U.S. 968; *Boulet v. Beals*, 177 A. 2d 665; *Sternberg Mfg. Co. v. Miller, Dub. & P. Mfg. Co.*, (CA 8) 170 F. (*sic*) 298; *Meyerson v. Hurlbut*, 98 F. 2d 232, cert. den. 305 U.S. 610; Santiago Gargía, Presby: *Crimes Against Honor: Law in Force and Proposed Legislation*" Rev. Jur. de U.P.R. Vo. XXXVII (1968), No. 2, pp. 319-385; Rivarola, Rodolfo, *On Crimes Against Honor in Spanish Legislation*, 118 Rev. Gral. de Leg., y Jurisp. Madrid, pp. 176-188 (1911).

In *U.S. v. Grace*, 51 LW 4444 (1983), quoting *Adderly v. Florida*, 385 U.S. 39 (1966), the U.S. Supreme Court established that the right to freedom of speech is not unlimited:

> "We have regularly rejected the assertion that people who wish 'to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.' "

Dealing with criticisms of commerical conduct, the protection is clearer. In *Vegod Corp. v. American Broadcasting Companies, Inc.*, 603 P. 2d 14 (1980), in which a company that worked at closing businesses was defamed, the Supreme Court said:

> "Criticism of commercial conduct does not deserve the special protection of the actual malice test, balancing one individual's limited First Amendment interest against another's reputation interest. (*Herbert v. Lando*, 441 U.S. 153 (1979) We conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows that those assuming the role of business practice critics do not acquire the First Amendment privilege to denigrate such entrepreneur."

And, in *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F. 2d 583 (CA 1, 1980), that had to do with a corporation that worked at constructing quality boats and had an excellent reputation until the quality of their boats was called to question in an article, and it sued for libel. Quoting one of the most outstanding treatise authors in constitutional law, L. Tribe, *American Constitutional Law*, pg. 645 (1978), the Supreme Court stated:

> "A fairly high threshold of public activity is evidently necessary for a finding that a person has voluntarily plunged into a public controversy."
> "We recognize the attraction of broad and clear-cut definitions in terms of simplifying litigation, but we cannot see how corporations as a class can be said to be 'public figures' for First Amendment purposes . . ."

The Court commits an error when it confirms an award that determines that the Williams corporation or Andrews are subject to the test of malice for a public figure.

The ruling case on libel is *New York Times Co. v. Sullivan*, 376 U.S. 254. But the doctrine was better elaborated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323; and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) by the Federal Supreme Court:

> "The standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254, as later extended, which bars media liability for defamation of a public figure absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth, is inapplicable to the facts of this case.
>
> "a. Respondent was not a 'public figure' since she did not occupy a role of special prominence in the affairs of society" and had not been 'thrust . . . to the forefront of the particular public controversies in order to influence the resolution of the issues involved. Gertz
>
> "b. The New York Times rule does not automatically extend to all reports of judicial proceedings regardless of whether the party plaintiff in such proceedings is a public figure who might be assumed to have voluntarily exposed himself to increased risk of injury from defamatory falsehood.

As to what constitutes a public controversy, the Court said

> "But in doing so, petitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 US 29 (1971), which concluded that the New York Times privilege should be extended to falsehoods defamatory or private persons whenever the statements concern matters of general or public interest. In Gertz, however, the Court repudiated this position, stating that "extension of the New York Times test proposed by the the Rosenbloom plurality would abridge a legitimate state interest to a degree that we find unacceptable." 418 U.S. at 346.
>
> "Petitioner would have us extend the reasoning of *Cox Broadcasting* to safeguard even inaccurate and false statements, at least where "actual malice" has not been established. But its argument proves too much. It may be that all reports or judicial proceedings contain some informational value implicating the first Amendment, but recognizing this is little different from labeling all judicial proceedings matters of 'public or general interest' . . . Presumptively, erecting the New York Times barrier against all plaintiffs seeking to recover for injuries from defamatory falsehoods published in what are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the First Amendment. And in some instances, such an undiscriminating approach might achieve results directly at odds with the constitutional balance intended . . . our decision in that case should make it

> clear that no such blanket privilege for reports of judicial proceedings is to be found in the constitution . . . As to inaccurate and defamatory reports of facts, matters deserving no First Amendment protection, see 418 U.S. at 340. We think Gertz provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault."

Philadelphia Newspapers, Inc. v. Hepps, 54 LW 4375 (1986), also deals with the balance between the right to freedom of speech and the right to a reputation. Expanding on the doctrine of *Gertz*, the United States Supreme Court established that a private figure, in an action for defamation AGAINST THE PRESS OR ADVERTISING MEDIA, in order to be able to collect damages has to prove that the statements are false. Justice O'Connor summarizes:

> "One can discern in these decisions two forces that may reshape the common law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or a public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in Gertz, the constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some other range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dunn &*

> *Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 US 4866 (1985), the constitutional requirements do not necessarily force any change in at least some the features of the common law landscape."

We rest, in addition, on *Waldbaum v. Greenbelt Consumer Service, Inc.*, 627 F2d 1287 (1980):

> "From analyzing Gertz and more recent defamation cases, we believe that a person can be a general public figure only if he is a "celebrity"—his name a "household word"—whose ideas and actions the public in fact follows with great interest. We also conclude that a person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants. In undertaking this examination, a court must look through the eyes of a reasonable person at the facts taken as a whole.
>
> "With this background, we turn to the standards themselves for determining when a person is a public figure. A court first must ask whether the plaintiff is a public figure for all purposes. Gertz, as noted above, held that a plaintiff would be found to be a general public figure only after a clear showing of "general fame or notoriety in the community and pervasive involvement in the affairs of society . . ." at 352. He must have assumed a 'role of especial prominence in the affairs of society . . .' *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Accord, Wolston v. Reader's Digest Association*, 443 U.S. 157 (1979). In other words, a general public figure is a well known celebrity, his name a 'household work.' The public recognizes him

> and follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of its attention or because he (*sic*) actively pursues that consideration.
>
> "Few people, of course, attain the general notoriety that would make them public figures for all purposes."

The record demonstrates that if Andrews received a publicity highlight in the press, it was not promoted by him but rather by Villalba when the latter held several press conference that were televised and making constant statements in the press that Mr. Andrews never answered. If anyone jumped into the public arena, it was Villalba; and the notoriety created by him cannot turn a person that never went before the press into a public person because the dismissal in question was merely private. Andrews is hardly a "household word." The Judgment that sustains an award that is not consistent with the law, must be reviewed.

The Judgment that Sustains the Award is Contrary to Act 80 of May 30, 1976, as Amended and to the Ruling Case Law.

Act 80 of 1976 in Article 2 (29 L.P.R.A. § 185b) clearly establishes that:

> "It will be considered just cause for the dismissal of an employee from an establishment:
>
> "(a) That the worker follows an improper or disorderly pattern of conduct.
>
> * * *

> "It will not be considered a discharge for just cause that which is made by mere whim of the employer or without a reason related to the good and normal operations of the establishment."

Mr. Villalba was dismissed under causes (a) and (c) of Act 80 quoted above, after the casino license was denied which affected the proper functioning of Williams Hospitality. Once it has been proven that the disloyal and improper action of the employee actually affected the proper functioning of the business and reputation of the employer, a legal just cause existed for discretionarily dismissing the employee. In the light of the doctrine of *Srio. del Trabajo v. I.T.T. Western Hemisphere Directories, Inc.*, 79 JTS 29 (1979), an Arbitrator cannot substitute the criteria of an employer—whose collective bargaining agreement grants him exclusive authority for establishing reasonable rules and for managing his business—to separate an employee that causes damage when the substantial evidence on the record sustains that the conduct imputed to the employee was perpetrated; and that it produced considerable damages to the company.

A Judgment that rests on a state of law adopted subsequently and which, therefore, did not give due notification to an employer that the dismissal was considered illegal is untenable.

As a reaction to the dismissal of mention, on July 3, 1986, Act 65 was approved amending Act 80 to declare as unjustified the dismissal of an employee for his statements during an investigation before any administrative, judicial or legislative forum in Puerto Rico. This reaction was later moderated by Act 9 of October 3, 1986, where the very Puerto Rico legislator qualified that the protection of statements comtemplated in Act 65, does not include when these are of a defamatory nature or constitute a disclosure of privileged information. Even more importantly, both Act 65 and 9 pro-

vide that they will go into effect immediately *after* being approved.

In accordance with the general principles of civil law:

> " "the laws shall not have retroactive effect, if it not *expressly* provided otherwise. In no case may the retroactive effect of a law, harm the vested rights under the above-mentioned legislation." 31 LPRA § 3 (Underling added.)

The amendments to a law have *prospective* effect except when otherwise provided. *Luce and Co. v. JSM*, 62 D.P.R. 452 (1943). *Vázquez v. Morales, 114 D.P.R. 822*, 831 (1983).

Therefore the Court of instance could not consider applicable the cause of unjustified dismissal that said amendments establish, because the amendment was not retroactive in its application, according to what was decided in *García v. American Airlines*, 673 F. Supp 63, 66 [DCPR 1987], in which—as in our case—the dismissal occurred in November of 1985, eight months before the effective period of Act 65. The District Court decided:

> "Puerto Rico adheres to the general non-retroactivity of the laws. 31 LPRA § 3. Only when the legislature intends retrospective application can this general rule be avoided, but such intent must be clear on the face of the statute . . . *Law 65 is clearly intented to operate prospectively* . . . We find no reason to circumvent 31 § 3 policy and *thereby impose an undue burden on the defendant to confirm its action with non-existent law.* We shall *not therefore impose the non-retaliation law retrospectively.* ***CF Dion v. Secretary of Health and Human Services*** 823 F2d 669, 671" (1st Cir 1987, (Underling added).

Therefore, the decision of instance turns out to be contrary to law, when it rests on law 65 and law 9, [footnote #2]

imposing sanctions that that imposes on the employer for not complying with a law that was nonexistent at the time of the dismissal. (Ap. I, p.4) The dismissal of mention took place eight months before this amendment went into effect. Imposing a retroactive effect would be unconstitutional since it would deprive the employer of his property without due process of law. This High Court has already decided, since 1943, a controversy similar in *Luce, supra*, in which case the statute in controversy, as it is here, was born as an answer to a strike conflict that ended in February of 1942. This High Court decided that the new protection of law was not applicable to workers who were involved in said conflict since the law went into force in April of 1942 and did not expressly provide for its retroactivity. In our case, we have seen both Law 65 and 9 provide force and effect *after* their being approved. To give retroactiveness through judicial interpretation, contrary to the doctrine of separation of powers, constitutes an invalid substitution of the criteria and express intent of the legislator.

Under Act 80 only the arbitrary and capricious dismissal that was not related to the proper functioning of the company was prohibited. A dismissal of an employee who publicly dishonors his employer and charges him with committing crimes which he never managed to prove cannot be arbitrary. A dismissal of a person who maliciously causes considerable malicious damage to the company he works for cannot be capricious. The dismissal was directly related to the proper functioning of the business. Villalba's pattern of conduct was crystal clear, his dismissal was not prohibited by law on the date on which he was separated since it would not be prohibited even today, under law 80 as amended, if the judicial analysis absent in this case reflected the falseness of the accusations and the libelous effects, damages that affected the proper operation of the business. We rest on *Pueblo v. Galanes*, 15 D.P.R. 391; *Catalfo v. Jensen*, 657 F. Supp 463 (1987).

The dismissal is not unreasonable, nor capricious, nor arbitrary, nor illegal. What is not reasonable is that an employer has to "stomach" an employee who is undermining his public trust, that promotes the destruction or limitation of his business, who publicly humiliates the President of the company charging him of events that he knows all too well are not true. It is not reasonable, knowing that in every possible forum Villalba had declared a continuous war against his employer, to have to reinstate him so that instead of strengthening the labor-management relations, they are weakened. On point are the quotations from the work Othello by William Shakespeare, that the Honorable Supreme Court Justice, William Rehnquist quoted in the recent case of *Milkovich:*

> "Good name in man and woman, dear my Lord,
> Is the immediate jewel of their souls,
> Who steals my purse, steals trash;
> 'Tis something, nothing;
> 'Twas mine, 'tis his,
> And has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed."

The Determinations of Fact are not Substantiated by the Totality of the Record Whereby it Constitutes an Error of Law.

The function of the Arbitrator that is requested by the parties to decide in accordance with the law is analogous to that practiced by a sentencing court of first instance, as argued before. *Sonic Knitting Industries, infra.* The errors that we impute to Arbitrator Rodríguez are all issues of law whereas even his determinations of law deviate from the ample evidence that clearly appears in the totality of the record, so that that error becomes an error of law. *Universal Camera Corp. v. NLRB*, 340 US 474 (1951); *Rodrigo, infra.* e.g.

> it is not true that Condada Plaza did not submit information for fiscal year 1983-84; nor is it correct that to the 34.71 per cent share in the market that the Condado Plaza had, if you added the 14.53% of the Hotel San Juan and 2.16% of Palmas del Mar would reflect 63.85% of the market because when Villalba accused Williams Hospitality of monopolizing 50% of the gambling in November of 1985 it had still not opened the San Juan Hotel & Casino, which was inaugurated on December 10, 1985, which the arbitrator should have known since the evidence established that after such statements the Deputy Secretary of the treasury denied the license.

The falsehoods for which Villalba was dismissed were verifiable by the Arbitrator from the evidence submitted, since Condada Plaza made great effort in preparing charts on generated employment that demonstrated that it was not true [and that Villalba knew it because he received dues from the members] that jobs were being reduced, evidence that was erroneously evaluated; or ruled out by the Arbitrator if it did not gibe with his opinion. Comparative statistics were also submitted, about the market share of the five main casinos to demonstrate that a monopolistic tendency could not exist in the free market of gambling. We shall elaborate on our brief on this topic.

The Arbitrator concentrated his award on the libel of imputing monopoly in spite of the fact that 13 falsehoods were pointed out to him in the libelous document. The Arbitrator could not find, [Ap. II. p. 20] that it was true that Villalba imputed a violation of games of chance when there are at least two documents with Villalba's own signature, newspaper articles, and videos from Channel 2 and 4 that we presented. The Arbitrator decided the case without doing the homework of

evaluating the evidence arduously submitted by Condado Plaza.

Nor did he consider the damages proved at the hearing, which is decisive under Act 80, *supra*, in order to decide if the dismissal was due to a cause related to the proper functioning of the businesses in addition to the pattern of proven improper conduct; or if it was arbitrary or capricious and therefore unjust.

All of the hearings were transcribed and the documentary evidence is extensive, the Court being in the same position of weighing the evidence in this case as there is no controversy over the credibility of the witnesses. *Chase Manhattan Bank v. Emmanuelle Bauzá*, 111 D.P.R. 788 (1981); *Rodrigo v. Tribunal Superior*, 101 DPR 151 (1971); *Luce and Co. v. Junta de Salario Mínimo*, 62 DPR 452 (1941). There is no controversy over the facts that give rise to the dismissal, and Mr. Villalba never refuted the proven damages. Therefore, the entire case revolves around an interpretation of law that the Court is in a position to settle.

It is in Order to Review a Judgment that Confirms an Award that Contrary to Law Determines that the Labor Doctrine Elaborated Under the National Labor Relations Act on the Disloyalty that Discredits the Service or Product of the Employer as Just Cause for Dismissal Does Not Apply.

The Arbitrator rules out the application of the case of *NLRB v. Electrical Workers*, 33 LRRM 2183 that quoted the landmark case of *Jefferson Standard Broadcasting Company*, 94 NLRB 1507, enf'd. 346 U.S. 464 (1953) whereby supposedly the statements by Villalba were applicable to the whole industry. Such a conclusion is grossly erroneous whereby it is Williams Hospitality that Villalba characterizes as monopoly; it is to Williams that he petitions the legislature not to approve loans and subsidies; and to control its expansion. There were no indirect attacks on the employer [Ap. II, p. 24] but rather the public criticism was directed at a single company that was

not the subject of legislative investigation, of accusations by name and last name. The application of the case in which the dismissal of the president of the Union was sustained for publications that generated comments in the community, and that caused apprehension in the employer and a loss of income was in order. We quote:

> "There is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise. (at page 2186)
>
> "They did not indicate that they sought to secure any benefit for themselves, as employees, by casting discredit upon the employer. (nor in our case)
>
> "The policies attacked were those of finance and public relations for which management, not technicians, must be responsible . . . The handbill . . . attacked public policies of the company which had no discernible relation to the labor controversy."

In addition, we rest on the following cases that sustain that the actions tending to destroy the business of an employer are disloyal, illegal and cause for dismissal: *Hoover Co. v. Labor Board*, 191 F. 2d 380; *Boeing Airplane Co. v. NLRB*, 38 LRRM 2276 (1956); *Coca Cola Bottling Works, Inc. & Retail Wholesales & Dept. Stores Union*, 186 NLRB 1050 No. 142 (1970); *Leviton Mfg. Co. and Local 1274, Int'l Brotherhood of Electrical Workers*, 203 NLRB No. 38 (1973); *NLRB v. Knuth Brothers, Inc.*, 92 LRRM 3275 (7th Cir. 1976); *NLRB v. Red Top, Inc.*, 455 F. 2d 721 (1972); *American*

Arbitration Association, Inc. & Holbrook, 233 NLRB No. 12 (1977); *Shulman's Inc. of Norfolk & Retail Store Employees Union*, 208 NLRB No. 117 (1974); *American Tel. & Tel. Co. v. NLRB*, (2d Cir. 1975); *Percival v. General Motors Corp.*, 400 F. Supp 1322 (1973)

The attack by Villalba was on the business of the employer; and therefore, the cases were on point. The Court erred in confirming the award that ruled out the law that it was obligated to apply.

VI

PRAYER

There is a substantial controversy of constitutional rights, in the two related cases that merit the issuance of the writ by this High Court. The right to freedom of speech in the market of ideas of the Legislature does not protect the abuse of the right in the same way as the right to freedom of speech in a Court does not protect the witness that commits perjury. We request that the writ be issued and that the Judgment be revoked in San Juan, Puerto Rico on October 25, 1991.

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EXHIBIT A

SYNTHESIS OF FACTS APPLICABLE TO THIS CASE OF CE-91-616

"On June 2, 1986, at the beginning of the arbitration hearing, the Condado Plaza promptly raised the question of disqualification of the entire Conciliation and Arbitration Bureau selected by the parties, which was the only party with jurisdiction to decide the controversy. It was asserted that the complaint was not substantively arbitrable but that we had reserved such an assertion until the beginning of the hearing as was proper according to the law. Nevertheless, that public appearance of the Secretary in favor of a measure when it had the case *sub judice* tainted the proceedings with partiality; and since arbitration is a voluntary process, Condado Plaza asked for the disqualification of the forum in favor of the Court or a private Arbitrator, especially when, in addition, the brother of the complainant was also an Arbitrator in the Bureau and the complainant Villalba as president of the union regularly visits the Bureau and therefore all the arbitrators know him.

"On August 1, 1986 Director Belgodere erroneously found that the motion for disqualification was untimely and that the Condado Plaza by selecting the arbitrator had already submitted itself to the jurisdiction (which is not only erroneous in law but also contrary to the practice and Regulations of the Bureau itself). The Arbitrator adopted that determination, according to what appears in this arbitration record.

"The case was rescheduled for September 26, 1986.

"Upon receiving the scheduling, we diligently appeared in the Federal Court on September 8, 1986 requesting that the proceedings be stayed in aid of jurisdiction since our complaint had still not been processed. On September 17, 1986 our Motion for a Stay was denied.

"We then responsibly went to the hearing on September 26 when we stated for the record that we were not waiving raising

all of our defenses in the courts. We tried to have the Arbitrator first decide whether he had jurisdiction or not under the agreement, allowing us to exercise the right to judicial review of the substantive arbitrability and petition for disqualification, before hearing the merits of the dismissal, in accordance with the agreement by the parties under the collective bargaining agreement. The Arbitrator denied our motion forcing us to discuss the merits of the dismissal under the penalty of continuing the hearing *ex parte* if we refused to participate. We then requested a ruling from the Arbitrator that our participation did not constitute a waiver of the right to obtain complete judicial review on the determinations of fact and of jurisdictional law and impartiality . . . and the Arbitrator also refused to issue such a ruling. We refused to grant jurisdiction to the Arbitrator in our submission agreement to decide the merits of the dismissal limiting his purview to the determination or substantive arbitrability that in the first instance it was up to him to decide since the issue of disqualification he decided against us. But, the Arbitrator supplied a submission taken from the proposal of the union that included both controversies. The record of 17 hearings shows that we never waived the issues that are the subject of this appeal BUT THAT WE DID NOT HAVE ANY OTHER CHOICE THAN TO PARTICIPATE TO RESPONSIBLY DEFEND THE RIGHTS OF THE CLIENT WITHOUT THE HARM THAT ABANDONING THE COURTROOM COULD BE HELD AGAINST HIM.

"In this case a clear lack of due process of law and lack of jurisdiction were raised as causes for invalidity in this case; but one or the other of the causes of invalidity arose as a result of the fact that the Arbitrator overlooked the agreement and the law in forcing the hearing of merits of the controversy, without having determined the substantive arbitrability and disqualification in the first instance that had been raised, and allow judicial review agreed upon by the parties in the agree-

ment that should have been interpreted in accordance with the law. It is hackneyed doctrine that substantive arbitrability is within the scope of the courts. *United Steelworkers v. Warrior & Gulf Navigation*, 363 US 585 (1961).

United States District Court
For the District of Puerto Rico
—CERTIFIED—
To be a correct translation prepared by:
Daniel Tomlinson 6-18-92
Certified Court Interpreter
Administrative Office of the
United States Courts

APPENDIX (v)(b)

CERTIFIED TRANSLATION

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN PART

CONDADO PLAZA HOTEL & CASINO,

Defendant-Appellant,

v.

ASOCIACION DE EMPLEADOS DE CASINO NEGOCIADO DE CONCILIACION Y ARBITRAJE and/or JUAN T. RODRIGUEZ,

Complainant-Respondent.

CASE No. KAC-91-0543 (901) REVIEW OF AWARD DISCHARGE OF VICTOR VILLALBA (AWARD No. A-2270)

PETITION FOR REVIEW

TO THE HONORABLE SUPERIOR COURT:

Comes now defendant-appellant, Condado Plaza Hotel & Casino, hereinafter known as Condado Plaza, and through its undersigned legal representation very respectfully petitions for this Court to review, within the legal term of 30 days, the arbitration award issued by Arbitrator Juan T. Rodríguez,

stating that the discharge of Mr. Victor Villalba was unjustified, which award we hereby impeach since the same is contrary to law and goes beyond the authority granted by the collective bargaining agreement subscribed between the parties.

(I)

JURISDICTION OF THE COURT

The Collective Bargaining Agreement in effect between the parties as of the date of the events, which we include as Exhibit I of this petition, provides in its Article V of Complaints and Grievances, in the portion related to the jurisdiction of this Honorable Court, the following:

> "8. The decision of the arbitrator shall be final and mandatory for the contracting parties, as well as for all employees covered hereunder *as long as the same be pursuant to law*. The findings of fact shall be conclusive, except as to matters of procedural and substantive arbitrability, which shall be resolved at first instance by the Arbitrator, but which could be the object of a judicial review. (Emphasis supplied)

Having the parties stipulated that the award has to be pursuant to law, the same is reviewable pursuant to the doctrine of *J.R.T. v. N.Y. & P.R. S/S Co.*, 69 D.P.R. 782 (1949), and its progeny.

(II)

AWARD IN CONTROVERSY

On March 8, 1991, Arbitrator, Juan T. Rodríguez, issued an award filed in the records on even date and received by the

Condado Plaza on March 12, 1991. Even though the Puerto Rican legislator provided in Act No. 170 of August 12, 1988, that the procedures before the Arbitration Bureau are excluded from the definition of "Administrative Agency" and therefore, as we see it, the provisions of the Uniform Administrative Procedure Act do not apply thereto, nor the Procedure Rules for the Review of Administrative Decisions before the Superior Court adopted by the Supreme Court, 4 L.P.R.A. AP VIII, to avoid procedural controversies, we filed our petition within the directive term jurisprudentially established by *Unión Independiente de la Industria Licorera de Ponce v. Destilería Serrallés*, 116 D.P.R. 348 (1985).

Along with this petition for review the award adjudging the merits of the discharge, we filed another petition for full review in Case No. A-1036 decided by the same Arbitrator on even date, in which prior statements of lack of substantive jurisdiction and the proper disqualification of the administrative forum timely filed were decided, which review we understand must be weighed before, since its provision could turn moot the elucidation of the merits of the discharge of Mr. Victor Villalba. We, first of all, split both recourses because they were separate awards; but mainly because knowing the judicial doctrine that the determination on substantive arbitrability is an inherent function of the courts, the parties in the collective bargaining agreement at bar, agreed that in cases of substantive arbitrability, the judicial review is valid in its full extension without having even the findings of facts of the Arbitrator be conclusive. Since the review or impeachment of awards is more limited under our state of law, we insisted during the hearing to keep separate the two cases and that awards with different numbers be issued when the Arbitrator forced us to air the merits of the discharge without resolving whether he had jurisdiction over the matter; and without resolving the disqualification statement which had a bearing over Condado Plaza's constitutional right to a due process of

law, statements which are object of the review in the germane petition filed on today's date, which we are requesting be assigned to the same judge.

(III)

STATEMENT OF FACTS

The pertinent facts for the trier to weigh this case, go back to October 1984. On the 31 of that month expired the Collective Bargaining Agreement between the Asociación and Condado Plaza, which was the employer successor that had recognized the Union as representative but it did not acknowledge all the rights granted by the preceding employer in the agreement about to expire. Condado Plaza assumed a firm negotiating position to recover all the unproductive time granted to the employees, even though it was willing to economically compensate such recovery of productivity. The Asociación assumed an uncompromising position as to not waiving any right previously acquired, even though it was really about a first collective bargaining agreement between the parties, all of which comes forth the record by means of multiple notices in the Island press submitted into evidence before the Arbitrator.

On November 5, 1984, the Asociación withdrew one of the 5 clauses agreed to in more than 1½ month of negotiation, finally showing its strategy of delaying the negotiation until Christmas time to order a strike, as it had effectively ordered with the preceding employer in the 1981 collective bargaining agreement. As an offensive tool to achieve an agreement before the Christmas season faced with the labor attitude, Condado Plaza ordered a lockout of the casino employees which lasted 107 days.

While on the streets, Mr. Victor Villalba, then Vice President of the Asociación, and his attorney Jaime Cruz, Esq., repeatedly charged the President of Williams Hospitality Man-

agement Corporation, manager of the Condado Plaza, the commission of several crimes; such as violating the Gambling Act, which is a penal statute, to unduly influence the Tourism Company and the Legislature, and of monopolizing gambling in Puerto Rico, as it comes forth the record submitted into Arbitration, which we hereby request be brought into this case before the Court. This was the first time that this employee publicly libeled his employer. Andrews never answered in the press these defamatory statements, understanding that this was a heated labor dispute and that in no way was it benefitted by fanning the flames, if a collective bargaining agreement was to be signed within the shortest term of time possible, as it comes forth his testimony and the evidence.

Condado Plaza prevailed in its complaints of productivity and as a consequence the Asociación had to accept an increase in the working schedule from seven hours to 7:20; the exclusion from the working schedule of the lunch time which unexplainably was paid as worked time, which already gave the employer 40 minutes of extra work per employee. It also had to give in to a change in the setting of the active shifts at the tables. Before, a croupier worked 1 hour at the table, rested for half an hour, which in a 7 hours schedule including the lunch time of half an hour, allowed a croupier to work five hours and rest for two. Condado Plaza obtained the shifts worked in other jurisdictions, such as Atlantic City, Las Vegas and as it was previously done in Puerto Rico; shifts of one hour of active work at a table, and a rest of 20 minutes, which along with the increase of 20 minutes in the working schedule, allowed Management a performance of 6 hours of work and 1:20 of rest in the working schedule, not counting the lunch time which now was not paid for. Another productivity measure obtained by Condado Plaza was to eliminate the four working days week with three days of rest, which cost 12 days of productivity per employee per year; to reduce the number of days for sick leave and for vacations, and the use of leave

without pay; all this addressed to avoid having this hotel, which had been bankrupted five times already in the past, follow the same path.

The collective bargaining agreement was signed on February 22, 1985, and the union obtained increases in salary and fringe benefits. Industrial peace was supposed to be assured for the 3 years of its effectiveness.

On February 28, 1985, the Legislature in Puerto Rico enacted Joint Resolution No. 102 ordering a general study of the tourism industry. (Exhibit II) Among the areas of the study it seems that the Legislature adopted Villalba's charges of monopolistic tendencies, even though no names were mentioned, on page 2. The Legislative Assembly summoned public hearings inviting the depositions of, among others, Messrs. Víctor Villalba, who by then was the President of the Asociación, as well as of Mr. Hugh Andrews, President of Williams.

Víctor Villalba was employed at the casino as croupier. In order to be absent from his job, he asked permission from the Director of Human Resources to depose on the development of tourism, which leave was granted. Once at the Legislature, in the presence of Mr. Andrews, Villalba addressed all his statement to a specific enterprise, Williams Hospitality, from the second paragraph of his address onwards, once he identified himself. (Exhibit III) In his deposition, Villalba abused the right to a constitutional expression, since he charged the commission of crime in a public forum of people with influence over his employer, he knowingly provided false information in at least 13 items, in an apparent intent to indirectly achieve through the Legislature what he was not able to achieve directly at the negotiation table, since in order to offer his points of view, he did not have to attack his employer present there, humiliating him before the public present at that occasion. This second round of defamation was considered by Hugh Andrews this time not as the product of a heated labor dispute, but as malicious retaliation; or at least a crass negli-

gence expressly directed to cause harm to the enterprise he presided and prompt the hate of the people.

On November 30, 1985, Andrews fired Villalba for maliciously harming his reputation, for disloyalty, and for interfering with the good development of the Condado Plaza. (Exhibit IV)

After his discharge, Villalba appeared before the Island press, again before the Legislature at least twice and on television, sustaining the charges made against his Employer, confirming his improper conduct before his employer, which caused his discharge. As a result of Villalba's statements, the license to operate the casino at El San Juan was denied to Williams Hospitality. As a result of Villalba's statements his employer was submitted to legislative investigations which ended in several bills to impose taxes on every concessionaire controlling more than 50% of the gambling, limiting the number of licenses it could be authorized, as well as bills to criminally penalize it, which were not turned into law as the House Bill 712 did, amending the Stipend Act to prospectively prohibit the discharge of an employee for statements before the Legislature. (Exhibit V) As a result of the statements, the permanent financing of the Hotel San Juan delayed almost for one year. There were immediate and mediate damages caused by Víctor Villalba on his employer which appear listed in the expense record which we consider must appear as an appendix to this case; and which evidence, the Arbitrator did not even consider in the award we consider to be null and void and inefficient.

Other facts related to the defense of arbitrability came forth, which have been listed in the petition for review of the corresponding award and should not be covered in this document.

On May 25, 1990, the arbitrability and disqualification controversy was submitted; and on July 31, 1990, the controversy as to the merits of the discharge was submitted. Nevertheless, the awards for one or the other cases, were issued on

the same date, which have been burdensome for Condado Plaza, given the size of a case which lasted 5 years and took 37 visits, which transcripts are before the Arbitrator, even though we are submitting a summary as part of the allegations that in one case and the other we filed in the arbitration forum. As Exhibit VI of this case we only submit the award on the merits of the discharge; and as Exhibit VII our brief before the Conciliation Bureau which we incorporate herein by reference, which contains as Exhibit a summary of the transcript, not in a narrative manner, but verbatim of the testimony of the witnesses, including that of complainant, only eliminating the extensive and heated argument by the attorneys and the corresponding interrogatories. The summary would be lacking the documentary evidence, but we belief that inasmuch as we are impeaching that the arbitrator did not understand or did not make a full assessment of the documentary evidence, the most correct thing to do would be for the Court to have the full evidence before it.

(IV)

STATEMENT OF ERRORS

1. The findings of facts are not supported by the total evidence in the record.

2. The conclusion of law that the discharge of Mr. Víctor Villalba was not justified is contrary to the clear letter of Article 2 of Act No. 80 of May 30, 1976, as amended, and the jurisprudence governing this field.

3. The Constitutional Conclusions of Law are mistaken:

   a. The expression at the Legislature were not defamatory.

   b. Mr. Hugh Andrews is a public figure.

c. It applies to the determination of libel and slander the same standard arbitrarily applied when and an employee misbehave while "off-duty", on his own time and off work.

d. It is not libel if the statement causes damages, it must be "incorrect" (without discussing libel *per se*)

e. It is not necessary to establish real malice in this case.

f. It is not the same to charge monopoly (it would be libel) than to charge monopolistic tactics (not libel)

g. It was not the obligation of deponent to verify the accuracy of the data he supplied as true to the Legislature, despite the fact he was requesting a legislative action to affect a third party, based on that data.

h. The data provided by Villalba on the reduction of jobs were "estimates" when the collective bargaining agreement had been signed 10 month before and the experience was that it had increased jobs, so it was not an estimate since there were figures known to Villalba that would belie such finding of fact and of law.

i. The statements were not addressed to the employer, but to an industry when the only employer mentioned is Williams Hospitality from the page one of the document on.

4. The Arbitrator falls into error when he concluded that the statements by Víctor Villalba were not defamatory, despite the fact that as a matter of law, he had determined that if the statements are defamatory they carry with them the discharge of the employee.

5. The Arbitrator falls into error when he concluded that the labor doctrine under the National Labor Relations Board governing disloyalty harming the service or a product of the employer is just cause for discharge, does not apply.

6. The Arbitrator did not render a full award, when he did not comply with his obligation under the agreement of deducting the income received by Villalba from the ordered retroactive pay, when Condado Plaza submitted evidence as to that.

(V)

ARGUMENTS ON THE ERRORS AND MATTERS OF LAW

On August 1, 1986, Director Belgodere wrongly decreed that the petition for disqualification was late and that Condado Plaza upon selecting an arbitrator had submitted itself to the jurisdiction of said arbitrator, which not only is erroneous in law but contrary to the practice of the Bureau itself. Arbitrator Rodríguez adopted such determination, as it comes forth the record.

The case was set for September 26, 1986.

As soon as we received the setting, we timely came to the Federal Court on September 8, 1986 requesting the stay of the procedures in assistance of jurisdiction, since our complaint had not yet been processed. On September 17, our Motion was denied. (See the record)

We then responsibly came to the hearing on September 26, and we stated for the record that we were not waiving bringing our defenses before the courts. We tried first to have the Arbitrator resolve whether he had jurisdiction under the collective bargaining agreement, reserving the right to judicial review on the substantive arbitrability and the petition for disqualification, before hearing the merits of the discharge, which we understood was the agreement of the parties under

the letter of the herein cited agreement. Arbitrator Rodríguez denied our petition forcing us to hear the merits of the discharge, under the threat of continuing the hearing *ex parte* if we would refuse to participate. We then requested a ruling from the Arbitrator as to the fact that our participation did not constitute a waiver of our rights, and the Arbitrator also refused to issue such ruling. The record show that we did not waive the statements object of this writ BUT THAT WE DID NOT HAVE ANY ALTERNATIVE OTHER THAN TO SUBMIT TO RESPONSIBLY DEFEND THE RIGHTS OF THE CLIENT WITHOUT THE PREJUDICE THAT AN ABANDONMENT OF THE HEARING WOULD BE INTERPRETED AGAINST IT.

Arbitration hearings were held as to the jurisdictional and disqualification aspects on June 2, September 26, October 21, 23 and 28, November 20, December 9 and 12, 1986; January 28 and 29, February 24, March 10, April 29 and 30 and June 1, 1987. Since the Arbitrator insisted in continuing with the merits of the case, the accuracy and validity of the award was left out. *Sonic Knitting Mills, infra.* The errors herein charged on Arbitrator Juan T. Rodríguez are all statements of law, since even his findings of fact go astray from the ample evidence which clearly comes forth the totality of the record. As an example, since it is impossible for us to list in the Petition the totality of the errors in the findings of fact due to the limitations on the length of the document, the Court shall verify:

—that it is not true that the Condado Plaza submitted information for the fiscal year 1982-83, but not for 1983-84.

—that it is not true that the percentage of 34.71 of market participation held by Condado Plaza if the 14.53% of the Hotel San Juan and the 2.16% of Palmas del Mar were added thereto, would show a 63.85% of the market, since by the time Villalba charged Williams

Hospitality of monopolizing 50% of the gambling in November 1985, El San Juan Hotel & Casino had not even opened, which opened its door on December 10, 1985, which the Arbitrator must have known since the evidence established that right after such statements the Deputy Secretary of the Treasury (who was a witness at the hearing) denied the license.

The falsehoods which brought about Victor Villalba's discharge were verifiable by the Arbitrator from the ample evidence submitted, since Condado Plaza did its best to prepare graphics of jobs generated since it started to operate in Puerto Rico showing that it was not true, and that Villalba knew it because he used to receive the membership quotas, that jobs were not diminishing, quite on the contrary, evidence which was erroneously assessed; or lightly discarded by the Arbitrator if not in accordance with his opinion. Also comparative statistics were submitted, year by year, as to the market participation of the five main casinos to show that there could not be any monopolistic trend in the gambling free market. Likewise, evidence was submitted, which was neither discussed nor considered, that in 1985 Villalba had no solid basis, as believed by the Arbitrator in his award, to say that there was a crisis in hotels closing down in Puerto Rico when as of that date, the Island tourism was recovering thanks to the gambling legislation and regulations critized by Villalba. The Arbitrator reaches the point of distorting, on page 17 of the award, our brief in which we charged that in the arbitration case in which Villalba rested to charge the 50% control of gambling on Condado Plaza, the Union's attorney, "lamely" supplied some statistics to show that despite the fact that the defendant employee in that case had a beard, Condado Plaza had 34% of the gambling in Puerto Rico, as if it were Condado Plaza which "lamely" had submitted the Arbitrator to such useless exercise. See page 57 of our brief in Exhibit VI. The Arbitrator centered his award in the libel of charging monopoly despite

the fact that 13 falsehoods were listed in the libelous document. The Arbitrator was not able to find, as it says in his award on page 20, that it was true that Villalba was charging a violation of the gambling Act where there are at least two documents signed by Villalba himself, newspaper articles, and videos in Channels 2 and 4 which we showed. This makes us think that the Arbitrator decided the case without doing the homework of assessing all the evidence so painstakingly submitted by Condado Plaza. We shall underline this evidence in the brief.

The Arbitrator in his award does not take into consideration the damages proven in the hearing, which is controlling under Act 80, *supra*, to resolve whether the discharge was due to a fair cause related to the sound practice of the business, in addition to the proven improper conduct pattern; and/or whether it was arbitrary or capricious and therefore, unfair; only resting upon the unbased exemption from guilt extended to Villalba that his actions were not incorrect. What the Arbitrator had to resolve was whether the discharge was due to a fair ground under Act 80, or whether it was arbitrary or capricious.

All the hearings were transcribed and the documentary evidence is extense, being the Court in the same position to weigh the evidence in this case, not existing any controversy as to the credibility of witnesses. *Chase Manhattan Bank v. Emmanuelli Bauzá*, 111 D.P.R. 708 (1981); *Rodrigo v. Tribunal Superior*, 101 D.P.R. 151 (1971); *Luce & Co. v. Junta de Salario Minimo*, 62 D.P.R. 452 (1941).

There is no controversy as to the facts which brought forth the discharge, and Mr. Villalba never controverted the damages proven in the hearing. Therefore, the entire case revolves around a strict interpretation of law that the Court would be in a better position to decide than an Arbitrator without any legal knowledge, resting upon the writings of each party.

Neither the Constitution of Puerto Rico, nor that of the United States, protects under the Guarantee of Free Speech an ill intentioned opinion based on false facts known to the defamer or negligently uncorroborated which may harm the good name of a person, which name has the constitutional protection in Puerto Rico and has been protected under the common law in the United States and by interpretation of the American Constitution.

The right to free speech was consecrated in Article II, Sec. 4 of our Constitution. In Puerto Rico the right to a good name was raised to a constitutional rank in 1952, Article II, Section B. Said protection has been acknowledged in libel actions of a civil as well as criminal nature in our code. *Pueblo v. Pérez Casillas, infra.* The equilibrium between these two rights is maintained without harm or prejudice as long as the right to free speech is used and not abused, which was clearly stated by our highest Court in *Pueblo v. Pacheco Padró*, 58 D.P.R. 737 (1941).

Therefore, the individual right to a good name comes over the right to free speech, even when dealing with the press, except when criticism or defamation is addressed against public officers, in which case another trend covers it obeying the interests of fiscalization by citizens of the officers who should be accountable for their public office. *Pueblo v. Rodríguez Hernández*, 86 D.P.R. 660 (1962).

We rest on *Pueblo v. Rodríguez*, 30 D.P.R. 666 (1928) and in *Pueblo v. Quintana*, 39 D.P.R. 202 (1929), as to the requirement of evidence of malice. In order for the defense of the truth to prosper in a criminal trial for libel, the defendant has to show not only the fact that it is true, but that the publication was done with good reason and justifiable ends. *Beauharnais v. Illinois*, 343 US 250 (1952). In *Pueblo v. Prensa Insular*, 69 D.P.R. 683 (1949), it was stated that: "When the commission of facts constituting a crime are charged, libel is actionable per se. *Mulero v. Martínez*, 58 D.P.R. 321 (1941). Villalba had to

show the truth of the facts, having charged three crimes and he did not do so. The Arbitrator did not have before him any exculpatory evidence. The award is null and void.

It should be pointed out that pursuant to the governing doctrine, Villalba committed libel in other ten points, even though no crime was charged, under the decision in *Bosch v. El Imparcial Inc.*, 87 D.P.R. 285.

The right to petition, protected as part of the Freedom of Speech Right of the First Amendment to the Constitution of the United States, and Section 4 of Article II of the Constitution of Puerto Rico, does not enjoy greater protection than other forms of speech under such laws and likewise it yields before the Right to a Good Name in 'the Democratic Balance of Justice.

The previously elaborated doctrine does not change before the fact that the libel had taken place at the Legislature, as already decided by our Supreme Court when the Cerro Maravilla events were heard, which we shall argue in our brief. *Pueblo v. Pérez Camillas*, CE 85-566, May 22, 1986.

> "We hereby resolve that it constitute perjury, punishable under Article 225 of the Penal Code now in effect . . . to testify before a legislative Commission as to the certainty of an essential fact, knowing it is false.
>
> The protection does not extend to perjured testimony. U.S. Applebaum, 445 U.S. 115 (1980)"

The case refers to legislative immunity extended to a deponent so requesting it in some cases. That is, the Legislature could, under the provisions of the Political Code, process Villalba. See also *Pueblo v. Bernard*, 32 D.P.R. 858 (1924).

In *Mac Donald v. Smith*, 105 SCt 2787, (1985), the Supreme Court resolved this point:

> "There is no sound basis for granting greater constitutional protection to petitioning than to other First Amendment expressions."

See: *Bagly v. Iowa Beef Processors, Inc.*, 737 F.2d. 632 (1986); 50 Am Jur 2d, p. 705; *California Motor Transport Co. v. Trucking Unlimited*, 404 US 508 (1972); *D & B v. Greenmoss Builders, Inc.*, 53 LW 4866 (1985); *Connick v. Myers*, 461 US 147; *PRHA v. Nogueras*, Civil No. 79-736 (1979); *Hernández Agosto v. Ortíz Montes*, 115 DPR 564 (1984); *Romero Barceló v. Hernández Agosto*, 115 DPR 368 (1984); *Peña Clos v. Cartagena Ortíz*, 114 DPR 576 (1983).

It has been decided that a corporation could be slandered, since it is recognized as a person. It is without a doubt that the judicial person has its credit and prestige which must be protected; therefore, it can bring a slander action regarding its businesses, credits, officers, shareholders or employees when harmed. It has been likewise sustained that a corporation can recover from defamation offending its financial position, its method of business or when charged with fraud, crime or mismanagement. Santiago, *Id.* 328; 33 Am. Jur., Sec. 193, p. 183. We rest our case on *Cooperative de Seguros Múltiples de P.R. v. San Juan*, 294 F. Supp. 627 (1968); *Las Monjas Racing Corp. v. PR Ilustrado*, 58 PRR 930; *Rosado v. Flour Int'l*, 81 PRR 592 (1959); *Jiménez v. Díaz Corujo*, 14 PRR 9 (1908); *Pueblo v. Colberg*, 24 DPR 673 (1911); "American Jurisprudence" 50 Am. Jur. 2d 497, *Libel & Slander*, pp. 497-781; *Owens v. Scott Publishing Co.*, 84 P2d 296, cert. den. 350 US 968; *Boulet v. Beals*, 177 A2d 665; *Stenberg Mfg. Co. v. Miller, Dobb & P. Mfg. Co.* (Ca8) 170 F. 298; *Meyerson v. Hurlbut*, 98 F2d 232, Cert. den. 305 US 610; Santiago García, Presby: *Los*

Delitos Contra el Honor: Derecho Vigente y Legislación Propuesta, Rev. Jur. de U.P.R., Vol. XXXVII (1968), No. 2, pp. 319-385; Rivarola, *De los Delitos Contra el Honor en la Legislación Española*, 118 Rev. Gral. de Leg. y Jurisp., Madrid, Spain, pp 176-188 (1911)

In *U.S. v. Grace*, 51 LW 4444 (1983), cited and *Adderly v. Florida*, 385 U.S. 39 (1966), the Supreme Court of the U.S.A. established that the right to free speech is not unlimited:

> "We have regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."

Being criticisms to commercial conduct, the protection is further limited. In *Vegod Corp. v. American Broadcasting Companies, Inc.*, 603 P. 2d 14 (1980), where a company devoted to closing business was slandered, the Supreme Court said:

> "Criticism of commercial conduct does not deserve the special protection of the actual malice test, balancing one individual's limited First Amended interest against another's reputation interest. (*Herbert v. Lando*, 441 U.S. 153, (1979) We conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows that those assuming the role of business practice critics do not require the First Amendment privilege to denigrate such entrepreneur."

To conclude the argument on libeled corporations, which shall be our next topic, we cite the case of *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F. 2d 583 (CA 1, 1980),

which dealt about a corporation devoted to building quality boats and which enjoyed an excellent reputation, until the quality of its boats was placed in doubt in an article and the same sued for libel. Citing one of the most outstanding commentators of constitutional law, L. Tribe, *American Constitutional Law*, p. 645, the Supreme Court said:

> "A fairly high threshold of public activity is evidently necessary for a finding that a person has voluntarily plunged into a public controversy.
> We recognize the attraction of broad and clearcut definitions in terms of simplifying litigation, but we cannot see how corporations as a class can be said to be 'public figures' for First Amendments purposes . . ."

In the recent case *Milkovich v. Lorain Journal Co.*, 58 LW 4846, decided by the Supreme Court on June 21, 1990, it was clearly established that the constitutional privilege cannot extend to protect an "opinion" as part of the guarantees of the First Amendment. Despite the fact that the precedent was brought up to the attention of the Arbitrator by means of a Prologue, since we had already written the Brief, the Arbitrator paid no attention and did not decide according to law . . . therefore, the award is invalid.

The Arbitrator errs, as a matter of law, upon determining that Mr. Hugh Andrews is a public figure.

The record shows that if Andrews received an extensive publicity coverage in the press, the same was not promoted by him but by Villalba when he convened several press conferences which were televised and by making constant statements in the press which Mr. Andrews never answered. If somebody threw himself into the public arena, it doubtlessly was

Villalba; and the notoriety created by him cannot turn a person who never appeared before the press into a public figure, because the discharge at bar was merely a private matter.

The leading case in libel is *New York Times Co. v. Sullivan*, 376 US 254. The doctrine was elaborated in *Gertz v. Robert Welch, Inc.*, 418 US 323; and *Time, Inc. v. Firestone*, 424 US 448 (1976) by the Supreme Court of the United States:

> "The standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254, as later extended, which bars media liability for defamation of a public figure absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth, is inapplicable to the facts of this case.
>
> a. Respondent was not a 'public figure' since she did not occupy a role of special prominence in the affairs of society, and had not been thrust . . . to the forefront of particular public controversies in order to influence the resolution of the issues involved. Gertz.
>
> b. The New York Times rule does not automatically extend to all reports of judicial proceedings regardless of whether the party plaintiff in such proceedings is a public figure who might be assumed to have voluntarily exposed himself to increased risk of injury from defamatory falsehood."

The Supreme Court of the United States stated as to the interpretation of what constitutes a public controversy:

> "But in doing so, petitioner seeks to equate 'public controversy' with all controversies of interest to the

public. Were we to accept this reasoning, we would reinstate the doctrine advance in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 US 29 (1971), which concluded that the New York Times privilege should be extended to falsehoods defamatory or private persons whenever the statements concern matters of general or public interest. In Gertz, however, the Court repudiated this position, stating that 'extension of the New York Times test, proposed by the Rosenbloom plurality would abridge a legitimate interest to a degree that we would find unacceptable.' 418 U.S. at 346.

Petitioner would have us extend the reasoning of *Cox Broadcasting* to safeguard even inaccurate and false statements, at least where 'actual malice' has not been established. But its argument proves too much. It may be that all reports or judicial proceedings contain some informational value implicating the First Amendment, but recognizing this is little different from labeling all judicial proceedings matters of 'public or general interest' . . . Presumptively, erecting the New York Times barrier against all plaintiffs seeking to recover for injuries from defamatory falsehoods published in what are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such sacrifice is required under the First Amendment. And in some instances, such an undiscriminating approach might achieve results directly at odds with the constitutional balance intended. . . our decision in that case should make it clear that no such blanket privilege for reports of judicial proceedings is to be found in the constitu-

> tion . . . As to inaccurate and defamatory reports of facts, matters deserving no First Amendment protection, see 418 U.S. at 340. We think Gertz provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault."

Philadelphia Newspaper, Inc. v. Hepps, 54 LW 4375 (1986), also deals with the balance between the right of free speech and the right to a good name. Extending the doctrine in Gertz, the Supreme Court of the United States established that a private figure in an action for defamation AGAINST THE PRESS OR NEWS MEDIA, in order to collect damages has to prove that the statements are false. The Judge O'Connor summarizes:

> "One can discern in these decisions two forces that may reshape the common law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern, but the plaintiff is a private figure, as in Gertz, the constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some other range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dunn &*

Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 US 4866 (1985), the constitutional requirements do not necessarily force any change in at least some the features of the common law landscape."

We further rest on *Waldbaum v. Greenbelt Consumer Service, Inc.* 627 F 2d 1287 (1980):

> "From analyzing Gertz and more recent defamation cases, we believe that a person can be a general public figure only if he is a 'celebrity'—his name a 'household word'—whose ideas and actions the public in fact follows with great interest. We also conclude that a person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants. In undertaking this examination, a court must look through the eyes of a reasonable person at the facts taken as a whole.
>
> With this background, we turn to the standards themselves for determining when a person is a public figure. A court first must ask whether the plaintiff is a public figure for all purposes. Gertz, as noted above, held that a plaintiff would be found to be a general public figure only after a clear showing of 'general fame or notoriety in the community and pervasive involvement in the affairs of society. . .' at 352. He must have assumed a 'role of especial prominence in the affairs of society. . .' *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Accord, Wolston v. Reader's Digest Association*. 443 U.S. 157 (1979). In other words, a

> general public figure is a well know celebrity, his name a 'household word'. The public recognizes him and follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of its attention or because it can actively pursue that consideration.
>
> Few people, of course, attain the general notoriety that would make them public figures for all purposes."
>
> Andrews is hardly a "household word". The Arbitrator erred.

The Arbitrator erred upon concluding that the Statements by Víctor Villalba [sic] defamatory, despite the fact that as a matter of law he had determined that if the statements were defamatory they would warrant the discharge of the employee

The charge of a crime is a libel *per se*. The record show that the crimes for violation of the Gambling Act were charged, that the Arbitrator said that he could not locate the file; violation to the monopoly act; and the undue purchase of influence at the Gambling Department, which according to Villalba was run from the Condado Plaza; and the Legislature itself, which we shall identify in the brief. If the statements are not true, as most of them are not, they would also be defamatory. The Arbitrator had to pass judgment over the veracity or falsehood of the statements. . . without having Villalba placed him in a condition to decide on his behalf, as the record shows. We rest on *Garrison v. Louisiana*, 379, US 64 (1964); *Chaplinsky v. New Hampshire*, 315 US 568; *Herbert v. Lando*, 441 US 153 (1979); 50 Am Jur 2d, sec. 455.

The Arbitrator erred upon concluding that the Labor Doctrine covered under the National Labor Relations Act applying to disloyalty which causes harm to the Service or Product of the employer as just cause for discharge does not apply.

The Arbitrator discards the application of *NLRB v. Electrical Workers*, 33 LRRM, 2183 citing the leading case of *Jefferson Standard Broadcasting Company*, 94 NLRB 1507, enf'd 346 US 464 (1953) since allegedly the statements were uttered by Villalba as applicable to the entire industry. Such conclusion is crassly erroneous since it was Williams Hospitality which Villalba calls a monopoly; it is regarding Williams whom he asks the Legislature not to approve loans and subsidies; and to control its expansion. From the testimony clearly comes forth that all the public criticism was addressed to only one enterprise which was not the object of any legislative investigation. They were not round-about statements about the employer (page 24 of the award) but rather full blown charges. The case where the discharge of the president of the Union was upheld for publications which generated comments in the community, which in turn caused apprehension and loss of income for the employer should have been applied. I quote:

> "There is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise. (at page 2186)
> They did not indicate that they sought to secure any benefit for themselves, as employees, by casting discredit upon the employer. (Nor in our case)
> The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. . . The handbill. . . attacked public policies of the company which had no discernible relation to the labor controversy."

We further rest as to this topic, on *Hoover Co. v. Labor Board*, 191 F2d 380; *Boeing Airplane Co. v. NLRB*, 38 LRRM 2276 (1956); *Coca Cola Bottling Works, Inc. & Retail Wholesales Union*, 186 NLRB No. 142 (1970); *Leviton Mfg. Co. & Local 1274, Int'l Brotherhood of Electrical Workers*, 203 NLRB No. 38 (1973) ; *NLRB v. Knuth Brothers, Inc.*, 92 LRRM 3275 (7th. Cir. 1976); *NLRB v. Red Top, Inc.*, 455 F2d 721 (1972); *American Arbitration Association, Inc. & Holbrook*, 233 NLRB No. 12 (1977); *Schulman's Inc. of Norfolk & Retail Store Employees Union*, 208 NLRB No. 117 (1974); *American Tel. & Tel. Co., v. NLRB*, (2d. Cir. 1975); *Percival v. General Motors Corp.*, 400 F. Supp 1322 (1973) which sustain that the actions tending to destroy the business of the employer are disloyal, illegal and grounds for discharge.

Villalba's attack was against the business of employer; and therefore, the cases fit to a "T". The Arbitrator erred upon discarding them.

The Arbitrator did not issue a full award when he did not comply with his obligation under the agreement to deduct the income received by Villalba from the ordered retroactive payment, when Condado Plaza submitted evidence to that effect.

It is well known that the Arbitrator must decided every controversy before it. *Pérez, supra.* Evidence was shown through the testimony of Villalba as to how much he had earned as salary since his discharge . . . and the Arbitrator reinstated him with full pay when the cited agreement requires that the income be deducted.

The conclusion of law that the discharge of Mr. Victor Villalba was not justified is contrary to the clear letter of Article 2 of Act No. 80 of May 30, 1976, as amended, and the leading jurisprudence in the field.

Whether, the award issued is judicially valid under the doctrine of Sonic Knitting Industries v. I.L.G.W.U., 106 D.P.R. 557 (1977) and the Union Independiente de la Industria Licorera de Ponce v. Destilería Serrallaés, 116 D.P.R. 348 (1985).

Act 80 of 1976 in its Article 2 (29 L.P.R.A. sec. 185b) clearly establishes that:

> "The following shall be understood as just cause for the discharge of an employee:
>
> (a) That the employee follows a improper or disorderly pattern of conduct.
>
> * * *
>
> The discharge due to mere whim of the employer, or that without any reason related to the sound and normal functioning of the enterprise, shall not be considered as just cause for discharge."

Mr. Villalba was discharged under ground (a) of Act 80. Therefore, once the ground is proven, that the employee assumed a conduct reflecting an improper pattern of conduct which affected the sound functioning of the casino business of the Condado Plaza, the employer had a legal just cause to discretionally discharge the employee under the collective bargaining agreement in effect.

In *Secretario del Trabajo v. ITT, supra*, our Supreme Court already interpreted Act 80 establishing certain guidelines which the Arbitrator had to consider and accept, and did not.

The Arbitrator cannot substitute the criteria of an employer, whose collective bargaining agreement grants the exclusive

power to set reasonable rules and manage its business, to separate an employee when the findings of fact of the Arbitrator established that the charged fault was committed and the present state of law grants the termination of employment due to an improper pattern of conduct, disloyalty and malicious damage to the employer's business, under the light of *Secretario del Trabajo v. I.T.T. Western Hemisphere Directories, Inc.*, 79 JTS 20 (1979) and *Sonic, supra.*

Even though we sustain that the Arbitrator's analysis of the constitutional rights in play here are contrary to law, the lack of observance by the Arbitrator of the law in effect under Act 80, AS IT EXISTED AT THE TIME OF THE DISCHARGE, is even more evident, since we have since that the "Villalba" amendment was legislated to establish only one ground for reinstatement in the job, but which cannot be applied to our case since it was not the law at the time of discharge due to the facts at bar. Under Act 80, the arbitrary and capricious discharge is prohibited. A discharge of an employee who publicly slanders his employer cannot be arbitrary. A discharge of he who maliciously causes considerable damages to the enterprise where he works, cannot be capricious. The discharge was directly related to the sound functioning of the business. Villalba's pattern of conduct was clearly established.

We rest on *Pueblo v. Galanes*, 15 DPR 391; *Catalfo v. Jensen*, 657 F. Supp. 463 (1987); and we shall extensively cite *Milkovich, supra* in our brief for its vital tangency.

The discharge was not unreasonable, nor capricious, nor arbitrary, nor illegal. What is not reasonable, is for an employer to "be stuck" with an employee who is undermining its public trust, who promotes the destruction or limitation of its business, who publicly humiliates the President of the enterprise by charging facts he well knows are not true. It is not reasonable, that knowing that in every possible forum

Villalba had waged a continuous war against his employer, to reinstate him so that instead of strengthening labor relations, they be weaken. If a cashier who steals $100 from an employer, can be legally discharged, how can an employee who not only stole his employer's good name, but also caused him damages in the thousand of dollars due to his negligent or malicious statements, be not discharged? Here we should cite the words of Othello by William Shakespeare, which Justice William Renhquist cited in the recent *Milkovich* case:

> "Good name in man and woman, dear my Lord,
> Is the immediate jewel of their souls,
> Who steals my purse, steal trash;
> 'Tis something, nothing;
> 'Twas mine, 'tis his,
> And has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed."

PRAYER

The right to free speech in the market of ideas of the Legislature does not protect the abuse of rights, just like the right to free speech in a Court of Law does not protect the witness who commits perjury.

We request the award be set aside.

Respectfully submitted in San Juan, Puerto Rico, today April 8, 1989.

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JUAN L. LLAGOSTERA
FEDERAL INTERPRETER AND TRANSLATOR

CERTIFIED

(signed)

APPENDIX (v)(c)

CERTIFIED PARTIAL TRANSLATION OF OFFICIAL TRANSCRIPT

Case No. A-1036
Hearing of June 2, 1986, certified on June 3, 1986 by Stenographer Myrta Rodríguez of Crespo & Rodríguez, Inc.

Tr 6, l. 15-20:

On the one hand, Mr. Villalba makes use of his right of free speech, which is protected by the Puerto Rico Constitution, if the statements made by him are protected, which we deny; on the other hand, the employer is also making use of certain constitutional guarantees of the right to its property and its reputation.

Tr. 10, l. 18-25, Tr. 11; l. 3-25:

But what is true is that the Secretary of Labor makes an appearance at this hearing which is held on April 8, you will note that it is already after we have, in fact, had two proceedings scheduled in this case, and it isn't until April 8th that we actually learn that the Secretary of Labor, as public policy, endorses House Bill 712, and appears at a public hearing to endorse that bill. While we have to admit that he raised the fact of whether that immunity was to be absolute or if it should be limited to being true statements. But nevertheless, he endorses it, he endorses House Bill 712, and adds his scope to likewise include judicial hearings within the scope of the bill.

It is well-known that anyone who appears to testify at a judicial hearing, who lies, is subject to perjury, may be prosecuted for perjury. Likewise, in the Legislative Assembly, a person who lies, or produces false statements, under the political code, may be prosecuted for perjury.

A decision of the Puerto Rico Supreme Court to that effect has just been handed down, relating to the police and agents of [the] Cerro Maravilla [case], an extremely interesting position, and one which establishes that very right, both of the Legislative Assembly and the Secretary of Justice, each on its own, to prosecute a person who appears at a legislative hearing and produces false data at that hearing.

We have the position of the Secretary of Labor to submit it, at least, with this averment, even though it lacks . . . there were additional averments by the representation, which arises [*sic*], naturally, in the question and answer period, which is not going to be reflected from the position which we have available to submit it to the Arbitrator.

Tr 12, 1. 3-24:

This attorney appeared at those public hearings and witnessed, not only the official statement which he brought in writing, but the additional remarks, we are trying to get a transcript, but we haven't obtained it yet, of the remarks made at that hearing in particular, but the situation is that we find ourselves in the difficult situation in which no matter how much we recognize the involvement of the Bureau of Conciliation and Arbitration and the history of integrity and uprightness of that agency, there is a conflict of interest, which is notable, in the face of an official legislative position taken by the Labor Department at a public legislative hearing in favor of one of the parties to this litigation.

If in addition to that fact we take into account that Mr. Victor Villalba's brother, Mr. Simeón Villalba, is an arbitrator in this Bureau, you can understand the concern of an employer which has committed itself, through a bargaining agreement, to the fact that the decisions of the arbitrator will be final and conclusive, and that awards are extremely difficult to review, unless certain very particular circumstances obtain, as opposed to a judicial decision, it has greater protection than a judicial decision from a lower court.

Tr. 13, l. 10-20:

But we did make an approach directly to Mr. Victor Villalba, by phone, in mid-May, to the effect that we would make use of one of the provisions of the collective bargaining agreement, an alternative which the collective agreement provides, in order for this employee to comply with its responsibility and its obligation, and without it being understood in any way that we are not trying to comply with our commitment at the bargaining table. We refer to the arbitrational clause of Article 5, of Complaints and Grievances, paragraph 10, which allows, and was agreed upon by the parties, for the choosing of a private arbitrator.

Tr. 15, l. 12-25, Tr. 16, l. 3-4:

We very respectfully feel that this is one of those situations, and that it is not a case of there already being manifest partiality, obviously we cannot even accuse the Bureau of that, and you will note that at all times I am saying the Bureau, because I want to make it perfectly clear that the assertion of disqualification, which is what I am making at this time, is not addressed to the Arbitrator. Any arbitrator who was presiding over this hearing would be under the same circumstances, because what is happening here is a problem of public policy of a Labor Department, which has appeared publicly, and certainly all arbitrators are subordinate to the Secretary of Labor, even though we know that their decisions are independent, but in any event there is an already expressed issue of public policy, and in addition, one of his coworkers, who works daily, is the adversely affected party's brother.

Tr. 35, l. 23-25, Tr. 36, l. 3-15:

Your Honor knows and is already settled in the field of arbitration, that the precise moment to raise any assertion of

procedural or substantive arbitrability, which is what we have done in this case, though by way of disqualification, procedural as to the manner of disqualification, and substantive as to the fact that there are constitutional rights involved, and that position is not new, having already been broadly ruled on in many other cases.

The time to make that assertion is precisely at the beginning of an arbitration hearing, it is neither before, nor is it afterwards; if it is done afterwards, then it definitely is late. But done before going into the merits, it is precisely the correct moment to raise a defense of arbitrability and certainly of disqualification which it is in this case. So the assertion can hardly be considered late.

Tr. 39, l. 15-25, Tr. 40, l. 3-20:

And it is not true that if this Bureau disqualifies itself, the plaintiff will be left without a forum, that is not true. It is not true, number one, because the parties foresaw it and negotiated it as part of the collective bargaining agreement, an alternative forum; the Bureau of Conciliation is not the only forum contemplated.

There was always considered and is . . . one of the written statements by the parties, the eventuality of a private arbitrator. But in addition to that, the forum of the courts is open under Section 301 and is available to try that case. So it is not correct that there is no other forum, the courts are there and it is a proper case to take to the courts, especially when there an issue of substantive arbitrability raised also, for purposes of the constitutional issues.

And to give you an idea of the fact that the assertion is not new, even though we were not planning to discuss [it], but we already have it at hand, since my colleague considers it new, we are going to cite a specific case in which a similar assertion regarding arbitration occurs, in the case of J.J. O'Donnell Woolens, Inc., and that is found in Volume 61 of Labor

Arbitration 739, in which Arbitrator Hogan, in 1972, that is, quite recently, finds and we quote: "Where the fundamental dispute is over the meaning of the contract in relation to facts the dispute should be resolved at arbitration, but when the dispute is over the meaning and application of court decisions the question should go to a court of competent jurisdiction unless the arbitrator finds that prior court decisions are clear and unambiguous when applied to the facts of his particular case."

Tr. 41, l. 12-23:

As for the fact that the Secretary of Labor has expressed different public policies on other occasions and that it is considered that arbitrators' decisions are independent of the opinion, we were the first to establish that that is normally and commonly so.

What is happening is that when the Secretary makes statements on different public policy questions, at least, that we've heard of . . . been aware, it has never been a case in which it is a statement concerning a case which is before him "sub-judice", and that the assertion and the position taken by the Secretary is already in favor of one of the parties.

Tr. 62, l. 6-13:

ATTY. SOTO:

And the only thing that I'll say for the record, is that the fact that Mr. Belgodere is ruling on an assertion of disqualification, that it is not to be understood that I am waiving, nor that it limits my authority and my right to pose a question of substantive and procedural arbitrability at the hearing on its merits, once it is determined which arbitrator is going to settle the controversy.

United States District Court
For the District of Puerto Rico

—CERTIFIED—

To be a correct translation Prepared by,

(Illegible)

7/14/92 Certified Court Interpreter
Administrative Office of the
United States Courts

CERTIFIED PARTIAL TRANSLATION OF OFFICIAL TRANSCRIPT

Case No. A-1036
Hearing of September 26, 1986, certified on December 2, 1986 by Stenographer Carmen Torres of Crespo & Rodíguez, Inc.

ATTY. SOTO:

Tr 7, l. 4-24, Tr. 8 (all):

I refer specifically to the fact that at the last hearing we stated in advance that at this hearing we would first make an assertion of disqualification to the Bureau of Conciliation in its entirety and an assertion of arbitrability. That was left clearly established at the last hearing, and the honorable Arbitrator on that occasion found that the assertion of disqualification of the whole Department was really a subject that was out of his hands and that basically since it was the entire Bureau which was being prayed for and not the disqualification of the

arbitrator specifically, that it was up to the Director of this Department, of this Bureau, to rule on that question. After extensive argumentation the parties agreed to present that assertion of disqualification in particular to the Bureau Director, for him to rule on.

The Director, Mr. Belgodere, in a letter dated August 1, 1986, ruled on the assertion of disqualification by concluding that our assertions in that regard were not valid. This is an assertion which is a threshold question, in other words, a lead-in, really, to arbitrability, we wish to comment, we wish to set forth for the record our objections to that resolution, so that in due time if this is reviewable, those points may be included.

In particular, from Mr. Belgodere's letter, which in addition, I believe, goes on to resolve questions which are really about arbitrability, which it really *is* up to the honorable Arbitrator, who is the only one who would have jurisdiction, to rule on the assertion of arbitrability and not the Bureau Director; there are a great deal of statements which we wish it to be left clear what our position is before going into the hearing on this case.

As for the conclusion, Your Honor, that the defense which we raised of disqualification of the Bureau was late, we very respectfully consider that it is a matter of a gross error, since the only one before whom disqualification or arbitrability could be posed is the honorable Arbitrator. In other words, one cannot represent a defense if it is not before an Arbitrator, because the collective bargaining agreement provides for a procedure where it says that all controversies are to be taken before an arbitrator, and an Arbitrator is to be selected to hear that.

Therefore we understand that the assertion was made on the first timely occasion in which we were before the jurisdiction of the Arbitrator, which subsequently the Arbitrator found that he shouldn't be the one to resolve it . . .

Tr. 20, l. 18 through Tr. 29, l. 8:

Now, returning to the matter of partiality, our position is the following: We feel, Your Honor, very respectfully, that in and of itself under local Labor Relations law, which is basically a "Wagnerian" law, it has not been amended, to put it in alignment with the U.S. Taft Hartley Act. The very fact that the Bureau of Conciliation is attached to the Labor Department violates U.S. public policy. We are making this assertion of law at this time.

We refer specifically to the Congress' legislative history when the Taft Hartley Act was passed. As Your Honor knows, there was a reaction to the growing unions and the well-known abuses which arose under the Wagner Act, and as a pendulum reaction, the law was amended and the Taft Hartley Act was passed, to cover unfair labor practices by unions, to control the unions, etc.

In those proceedings it is fully explained and discussed, my colleague Jaime Cruz is well aware, because it turns out that yesterday we were speaking of the matter, we have a copy here also, of part of the legislative history, but both in the House and Senate, the need to remove the Bureau of Conciliation and Arbitration from the U.S. Labor Department in that case was fully debated, you see, and the statements are basically addressed to the fact that the Bureau of Conciliation and Arbitration has to be a totally independent entity, because the way it was set up previously, there was a presumption of partiality inasmuch as the Labor Department has been created to basically help the worker. And that is where an image and a question and a presumption of partiality arise, by the mere fact of that Bureau being inside the Labor Department.

We are going to refer specifically to the record which says: "It was said that the Labor Department was formed to represent the interests of labor, and the Conciliation Service should be absolutely impartial between labor and employers." Among other things.

In addition, to support our point, we have other statements. There are other statements on the record, they are not the only ones, but for purposes of supporting and reinforcing our position. Allow me one second, Your Honor. They are statements made by the Senate, there are similar statements in the House of Representatives.

ARBITRATOR:

Federal?

ATTY. SOTO:

Federal, yes, by the United States Congress, we are talking about when the Hartley Taft Act was amended and adopted.

Statements to the effect that it said: "I do not want the Department of Labor to have even bookkeeping jurisdiction over such a board." Even bookkeeping, Your Honor. "I think that it is very important that we make clear to the business interests of the country and the public generally as well as to labor that if we are to make a fair approach to the peaceful settlement of labor disputes, we must have a Tribunal in which all parties have complete confidence."

There are a great many statements; we don't wish to burden the record, obviously, nor extend ourselves too much in this proceeding, but our assertion is that in Puerto Rico the Wagner Act was never amended. What we have existing basically is the Wagner Act, and this Bureau continues to be part of the Labor Department. And there continues to be a presumption of partiality by the mere fact of being within the Department of Labor, as was amply discussed. In cases in which a company such as ours is involved in interstate commerce, the governing law is Federal Law, and that has already been so ruled on from immemorial time, for at least three decades under the Lincoln Mills* case. It is Federal law and federal case law which applies even though it is heard locally and if there is nothing

Federal and there are local statutes or local case law which supplement that Federal Law, then local case law *is* indeed acceptable.

We feel that this principle violates Federal public policy. The whole intention of Congress was to remove the Department of Labor to offer the United States an impartial forum there; in Puerto Rico this has not occurred. Here the Department of Conciliation, excuse me, the Bureau of Conciliation still continues to be an integral part of the Labor Department, connected in functions, wages, working conditions and in everything relating to the Department and Secretary of Labor. The arbitrators may exercise their functions impartially or they may have the best criteria in the world, but that image of partiality, because it is inside the Department of Labor, cannot be wiped away by anyone, and it does not depend on the honorable Arbitrator; nor are we figuring that this is a case of the honorable Arbitrator who is presiding over this hearing, I hope we are understood properly. We are making a much broader assertion on a conflict which we feel is one of Federal public policy and that is why we have filed a case with the Federal Court, because there are some assertions here which we feel have some aspects of public policy, of Federal Law, even constitutional, which are not really appropriate for arbitration, which now go beyond the run-of-the-mill case, which the parties actually agreed to arbitrate.

So if to that pre-existent presumption, Your Honor, if in Puerto Rico this service was already within the Department of Labor and we have been dealing with that situation, they are services which are provided for free. What is more, I'll expand: in this legislative history there was opposition to the granting of free services, as it was felt that was sponsoring the bringing of grievances, in fact, discussions took place on fixing a maximum of around $500.00 in expenses for the parties who made use of that service, even the one which is independent. Here free services were being provided and they

were sought after precisely because of savings in costs, but that image of impartiality which is necessary for a forum, has to prevail in order for both parties to be able to have trust in the process which they chose freely, and it was chosen freely, there is no doubt of that, but it was chosen under the presumption that a completely neutral forum would be available to assist the parties in settling controversies which arise from day to day, which are impossible to completely settle internally.

When in addition to that element which is integrally present now because of the Constitution, one adds an official appearance by the Secretary of Labor at certain public hearings, Your Honor, to make statements favoring a measure which it is common knowledge has been adopted to govern this proceeding, which took place because Victor Villalba was dismissed, the Villalba amendment to the Indemnization Act and the Secretary makes an appearance to completely endorse that measure.

And we had stated earlier, because we believe, and we recall, perhaps memory does not betray us, if so, we beg pardon, but it seems to us that at the last hearing it was brought up that what he had done was to express a concern about the fact that if they were not true statements, they were not covered, and I really have to take exception to that, because the transcript of the hearing, specifically to questions by Representative González, to the representative of the Secretary of Labor, "Do you think that the workers should be protected when he appears at a legislative hearing?" Answer: "Definitely." Now, Act 80 on just dismissal does not provide for reinstatement or a dismissal protective fine, but Act 96 Minimum Wage Act does. Therefore, we understand that the protection already offered by Act 96 is better." Representative Gonález: "You mean that since Act 96 has better protection it should be amended?"

ATTY. CRUZ:

Your Honor, at this time we are going to request our colleague to supply us with a copy of the document that she is reading.

ATTY. SOTO:

Begging my colleague's pardon, since we are not submitting evidence, we are arguing, but he is quite right. "Exactly, the only thing you will have to do is amend Act 96 by including the legislative forum as a place where a worker may testify without fear of dismissal."

We could not debate there these statements made by the Secretary of Labor, because, look, the Labor Relations Act provides that an employee who files a charge of unlawful practice shall not be dismissed, then, clearly, the law exists for dealing with charges of unlawful practice and if an employee cannot proceed to file it, then in effect that law is moot. Therefore, he is protected. Likewise, the Minimum Wage Act, if an employee is not being paid the minimum wage or the rights to which he is entitled and he goes and accuses the employer, then how is he going to be fired, that is quite obvious, that is *de facto,* we so acknowledge that, but the thing is that this is not the situation of the case. Here it is not a matter of Mr. Victor Villalba's claiming certain rights in particular which he is being given statutorily under the law. Here it is a question of his going to a public hearing on another matter which is not related to his employer and there, without certain statutory rights to protect him, he makes certain statements which we declare not to be protected by the constitution, wherefore to extend it is absolute immunity, it really violates constitutional rights, and more so when it is adopted without due process of law, without giving this employer an opportunity to even express itself. Here what is involved is a

question of fundamental constitutional law before even beginning to discuss the dismissal *per se* of Mr. Victor Villalba.

Your Honor, if Mr. Victor Villalba was protected in his statements in the Legislature, the result is, there may be certain variants and other aggravating features and so forth, but the upshot is that the dismissal may possibly be unjustified. On the other hand, if those statements were not protected by the constitution, then the result should be that the dismissal be upheld.

Therefore, the primary issue here is not the collective bargaining agreement, the primary issue here is strictly one of substantive constitutional law.

It is for that reason that we are proposing that the grievance is not arbitrable, because the parties never agreed to arbitrate constitutional rights at the first instance, that is nowhere to be found in the bargaining agreement, it is not stated, nor was it the intention of the parties.

And it is most important that we be clear about all these mechanics and why it is that we are asserting that the Bureau, in this image of impartiality which it should project, is virtually vitiated from the start, without our being able, in due time, Your Honor, to determine, because that is the kind of thing that one cannot put one's finger on, whether these statements which the Secretary made in the arbitration forum may have affected the Arbitrator's reasoning. How are we to know? How are we to determine this?

Tr. 45, l. 8 through Tr. 46, l. 5:

It is to the courts that substantive arbitrability must be posed; that is why the action has been brought before the Federal Court. Procedurally, case law is procedurally, excuse me, I mean procedural arbitrability, when it is a question of whether the steps are followed or not, that is a question regarding which it has already been judicially determined that at the first instance it is resolved by an arbitrator, and then it

goes as a contested award to the Court. But in the case of substantive arbitrability, the Court retains full jurisdiction, because it is dealing with the crucial assumption that, "Look, we didn't agree to contract it." Therefore, since arbitration is a matter of contract and voluntariness, a party cannot be forced to try something which it has not agreed to arbitrate. And it is up to the Court to determine really if under the collective bargaining agreement that obligation exists, and the parties are entitled to raise it.

We are going to make reference to a quite recent case, from the United States Supreme Court, of May of this year, May 7, 1986, the quote is 121, colleague, LRRM-3326, *AT & T Technologies vs. CWA, Communications Workers of America*, CWA.

Tr. 52, l. 12 through Tr. 56, l. 5:

Now, in this case of ours, in which we have, Mr. Villalba does have certain constitutional rights, I likewise acknowledge it, but if he is willing to submit them to this forum, that is his prerogative and we respect it. But since we also have equal constitutional rights involved here, specifically the right to one's reputation, specifically the right to property, guaranteed under the constitution and specifically due process of law, which was denied us, we were not obliged to submit them to an arbitrational forum, because, look, it was never the intention of the parties that those rights which are statutory and constitutional and which are unrenounceable, as so determined not only by the United States Supreme Court, but our Supreme Court, constitutional rights are unrenounceable. If we have not expressly waived in the bargaining agreement and we have not waived it, we are perfectly entitled to raise it at this hearing and to demand first of all that said arbitrability be ruled on before we are forced to arbitrate a grievance. What we are saying is that we are under no obligation to arbitrate it and that we did not agree to arbitrate it.

That has to be ruled on first, whether in favor or against, but definitely this assertion has to be ruled on first.

And so erroneous is the Bureau's deduction, to the effect that if substantive arbitrability is raised in this case and in any other case, if it is resolved outside this forum, that virtually means that arbitrators are not competent to rule on anything, because everything has to do with some right. It is the Bureau's own regulations, Your Honor. Look, Bureau regulations provide, on page 3, paragraph "d", "that cases for discrimination covered by the provisions of Act 100 of June 30, 1959, as amended and/or by Title 7 of the Federal Civil Rights Act of 1964, as amended, shall not be heard before Bureau Arbitrators. The parties may try these cases by following the procedure approved to that end by the Secretary of Labor and Human Resources or before the appropriate administrative or judicial forums."

We do not know why; the Bureau made that exclusion "motu proprio", because actually, at least personally I do not know if hearings were held on this regulation, I assume they weren't, since it is of an internal nature, but as a question of reality, the Bureau itself limits itself to not hear civil rights cases which are to be tried in the courts because they are statutory rights. And it is mostly under this field that there arise the great majority of the cases to which reference is made and which cover us for the assertion, precisely, of arbitrability, because it is not new at all, it has not [*sic*] been asserted in a great number of other collective bargaining agreements and has been ruled on, as the ATT case was ruled on.

So civil rights, Your Honor, what do they arise under? What do civil rights arise under? Under a law, yes, but they arise due to the constitutional guarantees which individuals are given to equal treatment under the law, it is covered by the Civil Rights Act, the United States Constitution or the Puerto Rico Constitution in this case. Now, look, if these rights under statutory law, which are substantive, are not arbitrable, how is the

supreme law of the land, which is the highest to which one can go, going to determine that it is arbitrable? That is precisely what we are asserting, that it is an exclusion when there is a conflict of constitutional rights, as there are in this case. Both parties are entitled. We recognize that the colleague, that Mr. Villalba has a right guaranteed him by the First Amendment to the Constitution. We have other rights which we are also guaranteed. What is that balance of interests and what prevails? That is what the Court is going to have to decide, but the Court has to decide it. This is not the proper forum to determine this conflict which exists in this case in particular.

We respectfully believe that in the case before us here, basically, there is no substantial controversy of facts in terms of whether there will be variants or there will be causes or there will be reasons why it was said or done, but the facts in controversy as to whether Mr. Villalba was invited or subpoenaed, we don't know which of the two, to appear before the Legislature, that he made an appearance, he made a statement and said certain things there that the employer felt were disloyal, and the letter of dismissal says so, and that that was why he was dismissed, that is not going to be in controversy. What is in controversy is, precisely, the application of judicial decisions, the application of the constitution to those facts, that is, that is purely a question of law and it is not at all clear. The case which we had cited at the prior hearing, of which we supplied the colleague with the copy . . .

Tr. 56, l. 23, through Tr. 60, l. 21:

We were referring at the moment of the recess to statements in a case which we had already cited at the prior hearing, we had supplied the reference to fellow attorney Jaime Cruz, in which is found the doctrine that when there is . . . what is involved is the application of law, which is a question which is really for the courts. In this case in particular, the doctrine espoused in that case is, "Where the fundamental dispute is

over the meaning of the contract in relation to the facts, the dispute should be resolved at arbitration, but when the dispute is over the meaning or application of court decision, the question should go to a court of competent jurisdiction, unless the Arbitrator finds that prior court decisions are clear and unambiguous when applied to the facts of the particular case."

That is, if the right is so clear, because actually there is no question of law to settle, it is one of the possible exceptions.

In this case in particular, the law is scarcely clear. To begin with, there is no case, that we could locate, it's possible one exists, but we have made a thorough investigation, and we could never could locate one case in which the disloyalty of an employee or the statements of an employee against his employer made in a legislative forum, were the object of some kind of disciplinary action. In other words, in the legislative forum we find no case, at the Supreme Court level, nor at least at the level of the Federal District of Puerto Rico, of the First Circuit, we're not saying there isn't one, we are still searching. But there *are* a great number of Supreme Court decisions concerning what are protected statements, including under the National Labor Relations Act, cases which have arisen under the National Labor Relations Act of disloyalty to the employer, in which basically it has been found that loyalty is one of the most crucial elements to which an employer is entitled, assertions which we made before, naturally, the National Labor Relations Board, where the case has been held up.

We refer in particular to the case of NLRB versus Electrical Workers 346-US-464, in which, under the National Labor Relations Act, it is determined that, "There is no more elemental cause for discharge [of] an employee than; loyalty [*sic*] to his employer. It is equally elemental that the Taft Hartley Act seeks to strengthen rather than weaken that cooperation, continuity of service and cordial contractor relation between

employer and employee that is more of loyalty to the common enterprise."

There is a whole line of cases upholding disciplinary action against employees who have made statements which it is felt are neither protected by the United States Constitution, nor are they protected under the National Labor Relations Act, inasmuch as it is not a concerted action. The statements which are considered in concerted actions are protected under the law. In this case one of our attacks of law would be that it was not a case of concerted action, if it was not a case of concerted action, clearly, this is in the merits of the controversy, which we are not going to extend, but so that it can be understood what the scope of everything that is involved in this case is, it could not be a case of concerted action, because in the first place, there was no labor dispute at that time. There is a collective bargaining agreement signed between the parties which is supposed to put an end, for the three years it is in effect, to labor "unrest" as to the causes, conditions and terms of employment which the parties voluntarily negotiated. Many of the areas of statements by Mr. Villalba had to do with clauses which he himself signed in that collective bargaining agreement.

And on the other hand, a large part of the other recommendations which did not have to do with working conditions, but had to do with public policy that should exist or that he considers, in his opinion that should exist to promote Puerto Rico as a tourist destination, are aimed at reducing gambling in Puerto Rico. But, look, to its [the union's] membership what is applicable or in its best interests is that the gaming volume increases, because if the gaming volume were reduced and if the measures which Mr. Villalba recommended as president of the Union and supposedly on behalf of his its employees, were adopted, what it does is that if adversely affect its membership, on the one hand.

On the other hand, the accusations and recommendations which he makes against the employer, which has grown and is virtually the most solid operation there is and the one that offers those workers the greatest guarantee and security at their jobs, his own employer, which he himself says has been growing, are contrary to that growth continuing, they are contrary to it being given loans to keep operating, they are contrary to any number of things that all they do is, look, this employer which he says, among other things, that while others are in crisis and losing money, this employer is forging ahead, thanks to God, the membership which he represents is employed by this employer, and everything that has been done is to those employees' benefit; but his recommendations are contrary to that.

Therefore, we feel that it is not going to be a concerted action either, nor is it going to be protected action under the National Labor Relations Act.

Tr. 61, l. 7 through Tr. 63, l. 4:

To actually arbitrate this case is virtually to waive, number one, the guarantees which we have under the collective bargaining agreement. Number two, it is contrary to the intention of the parties. Your Honor is well aware, are you not, that once a dispute is arbitrated and an award is handed down, basically the only action an employer has to contest that award and the reasons for contesting that award are extremely limited by the deference which has been created under Federal Law to arbitrable decisions.

So as a matter of fact we would be submitting ourselves and waiving certain rights and a judicial proceeding and one's day in court, which is another constitutional right which the constitution provides us to process it, you see, under the proceedings, under the usual legal processes which an individual has guaranteed: his "day in court". That was never arbitrable, at no time did the employer agree to waive its constitutional

rights nor to waive its day in court, because in the court this whole proceeding has certain guarantees. Number one—and here in this case it is quite important, it seems to me that in the case of AT & T to which we made reference, if the Arbitrator allows us to borrow it, one moment, let me see if it is true, that some very to-the-point questions are indicated—no, it isn't this case—it seems to me then that it is the Alexander versus Gardner* case and what we are getting at here is the . . . in which the United States Supreme Court ruled: "On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has been especially necessary with respect to Title VII—we are talking here about a Title VII case—whose broad language frequently can be given meaning only by reference to Public Law concepts. Moreover, the fact-finding process in arbitration usually is not equivalent to judicial fact finding. The record of the arbitration proceeding is not as complete. The usual rules of evidence do not apply and rights and procedures common to civil trials, such as discovery, compulsory process, cross examination and testimony under oath are often very limited or unavailable, and as the court now recognize, arbitrators have no obligation to the court to give the reason for an award. Indeed, it is the informality of arbitral proceeding that enables it to function as an efficient, inexpensive and expeditious means for dispute resolution. The same characteristics, however, make arbitration a less appropriate forum for final resolution of Title VII issues than the Federal Courts."

Tr. 90, l. 17 through Tr. 91, l. 14:

Now, if the honorable Arbitrator feels that, for whatever reasons, which we are also going to discuss further on, he does not wish to stay [the proceedings] to wait and see what the Court resolves, or because he feels that yes, it should be resolved first, then we would have to insist that only the arbitrability of the grievance be decided, the substantive arbi-

trability, and we base ourselves on that, and even though we are skipping the order of the development which we have, in which it is very clear that the parties agreed that such subject matter was after all not going to be accepted that the determinations of the Arbitrator were conclusive, and it so states, in fact, that determination of arbitrability would not be processed as an action to set aside the award, by agreement of the parties, it would be processed as a judicial review. Judicial review at least is a much broader mechanism and is a very different way to appeal a decision than an action to set aside an award. So we cannot mix the cases on the merits with one case, with an action of arbitrability. We are going to mention to the Arbitrator the specific section to which we are referring, we are referring to Article 5 of Complaints and Grievances . . .

Tr. 93, l. 22 through Tr. 94, l. 7:

Yes, we are referring specifically to paragraph 8 of page 10, in which, while stating that the Arbitrator's decision shall be final and binding, an exception is made, "that the findings of fact shall be conclusive, except the question of arbitrability", and there it says, that by agreement of the parties such arbitrability may be the object of judicial review, which is not the case when an award on its merits is issued, where it goes as an action to set aside the award.

Tr. 101, l. 11 through Tr. 102 l. 11

In other words, I cannot submit to the jurisdiction of the Arbitrator especially when we reserved in the collective bargaining agreement that the question of arbitrability was going to be heard first and that it was the object of judicial review. And look, this case is sufficiently important for this company, and we so explained to him. In the conversations we had previously I have been very frank with Mr. Villalba as to what the position is going to be. Is that true or isn't it, Mr. Villalba?

About what the position has been and what the recourses are, this is a case that is not merely one you submit here and resolve. Here the company feels that the relationship between the parties due to the willfulness of Mr. Victor Villalba's action has been damaged to such a degree that a return, reinstatement, which is what is involved, perhaps if we were talking about an indemnization, we would be talking about something, but what there is here is a reinstatement, and more than anything a legislature that has moved to penalize an employer without giving it the opportunity to be heard. This has now become a major controversy for which the Company wants to exhaust all its recourses.

In the face of this situation, if we have agreed through a collective bargaining agreement that the question of arbitrability shall be the object of judicial review, then look, we have to make use of that, because it is here, the parties agreed to it, the parties signed it and we do not wish to waive it, and to submit ourselves to try the merits is to waive it.

Tr. 137, l. 15 through Tr. 141, l. 14:

ARBITRATOR:

That is what I have been unable to understand, Counsel, why the Company is going to wind up without a case, because two questions are heard jointly, I haven't been able to see that, that it would be harmed thereby.

ATTY. SOTO:

Well, Your Honor, we have an action to review your determination which you will make in due time, let's say that you opt for the second option, to hear the arbitrability question. That determination is the object of judicial review. When it goes to judicial review the record of the proceedings is sent up and the Court is to determine if there is substantial evidence in

the record to support that determination. That is, the weight and the avenues which the Court has to review via judicial review, are very different. That is, it is proper for the Court to review it as a question of law, and if there is no substantial evidence in that record, from the record in its entirety, you see it, the Court may review and make a finding, or otherwise, it may affirm it, may it not. That is, in an action to set aside an award, which is what I would be forced to do if I actually try the case on its merits, when hearing it jointly. Besides, I am submitting all the evidence on the merits, and the evidence on the merits may color in favor or against, in fact, the determination of arbitrability.

In other words, after presenting all my evidence, a court and any judge, is going to say, "Ah, no, look, this evidence—especially when you write the award—what part was about arbitrability and what was submitted on the merits". How do you separate that out, how do you divorce them?

ARBITRATOR:

Well, we separate it out here in the awards.

ATTY SOTO:

Well, insofar as your findings, but as to the facts and your mental process, that cannot be separated because, they are separated as they are formulated; but if they are aptly formulated, because arbitrators also like to protect themselves so that their awards won't be set aside, right, that's something we're aware of, although I know that they are divided, what cannot be divided is the appreciation of those facts, of that evidence that is submitted, nor what weight such-and-such a thing had in the mind of the judge, because that is intangible, that is intangible.

So for the losing party, whoever it may be, if an action to set aside an award is used; to be able to really prevail on review is

an uphill battle. Awards are given a deference that no court decision has. That is, it has more deference than a lower court, and that is really something, because the lower court is submitted to the test of judicial review. What I am saying is that here the agreement of the parties is that arbitrability is processed as a judicial review, because that was what we agreed to, and the Arbitrator has to interpret this collective bargaining agreement, and is bound by the interpretation of this bargaining agreement which the parties negotiated.

And if what I am raising is that this grievance is not arbitrable, I cannot be forced, when I am raising a substantive defense. It's different if I fail to appear, or I don't come. That is, it's not that I'm not here . . . look, what I'm alleging is that this is not arbitrable, I am alleging a right, and that is what I am raising. How can I be forced to try it, if it then becomes moot? No, then they would have to take it, which is how all the other cases are, as on "enforcement of the collective bargaining agreement", which in the end is a 301 as well. In the "enforcement" of the obligation to arbitrate is then decided the same issues as it is going to be decided in any event as it is phrased there. Because what I did with the Federal Court, think about it, what did I do with the Federal Court?

Let us analyze that so that it can be genuinely understood why I am making the assertion here. I could have come here and raised the issue of arbitrability, submitted evidence on substantive arbitrability and refused to hear the merits of the controversy, and what would have happened? Two things, either I would have been forced to try it and I would impugn that the award is not valid, because I could not be forced to try it, if substantively I am alleging that it was not proper, because I was raising a defense of arbitrability first and there is a collective bargaining agreement which provides that I have a right to judicial review. I would refuse to try it, and the opposing party could go to Court to force me to try the case. Well, I didn't want to do that; why not? Because that is

negative for my client's image. It is negative, because then it appears that we really don't want to comply with the collective bargaining agreement. Look, it isn't that we don't want to comply with the collective bargaining agreement. We have certain valid concerns and before we were brought, for refusal or breach of the agreement, we went, "Look, Court, determine whether this is arbitrable", and we told it, "look, we don't want to violate the collective bargaining agreement, but tell us if we are right or we are wrong. If we are wrong, we're wrong. But we believe that we have some valid points, so decide them because we don't wish to be brought here to the Court saying that we are violating the collective bargaining agreement."

Tr. 150, l. 11-23:

We feel that under even the Bureau's internal regulations an ex-parte decision is not proper, an ex-parte determination when an attempt to assert a situation is being made. The internal regulation, at least, what it provides is that one should proceed to try a case ex-parte when one of the parties fails to appear, in a "no show". That is not the case with us.

We have been here trying all day to convince the Arbitrator about our rights. Apparently we have failed, but we don't believe that there is anything that allows the hearing of an ex-parte action, which is so drastic, when what we are asserting at all times is that we have certain rights and that they are duly "subjudice" before a competent Court.

Tr. 166, l. 19 through Tr. 168, l. 9:

ATTY. SOTO:

Substantive arbitrability, I *am* willing to try it. What I am saying is about the question of the merits, the merits of the case is what we are questioning here. we are not questioning that arbitrability cannot be heard, as our colleague said, at first

instance by the Arbitrator. We are in agreement with that. We have no kind of controversy there. It is the merits of the case that we are asserting, because you say that . . . very well, for procedural economy, imagine, for procedural economy, it is practically forcing one to waive jurisdiction, clearly jurisdiction. But, procedural economy for whom? Because, think about it, if I didn't have to arbitrate this, then the procedural economy is not for me, because I am going to be forced to hear three days of hearing, since procedural arbitrability alone will take one day, and later when we get into the merits, we're going to lose two days of hearings and I will have to bring the President of the Corporation and I have to bring "John Doe" and I have to bring I don't know what-all, and afterwards it turns out that it wasn't arbitrable. Who lost procedurally? I mean, procedural economy has its place, but when a valid assertion is being raised that in no way is capricious, it seems to me, I don't believe that the Arbitrator will think it capricious, the elements which we have brought to the concerns which we have and of the elements which we have found in this case which are out of the ordinary, and which we feel should be determined and judged in light of all the facts and evidence.

So then, is procedural economy only unilateral for the Union? That brings us once more again to the beginning of what we raised before you concerning the partiality of this Department, because if you are only here to protect the right of the worker, then look, this is not an impartial forum, this is not an impartial forum, because the employer's rights also have to be considered, because one party has just as much right as the other. And we have that right and we have been asserting it since this morning.

Tr. 170, 1.3 through Tr. 172, 1.7:

Look, now, why do you think that in all the cases in which question of substantive arbitrability is raised the employer

refuse to try it, and he has to decide if to go to Court for a determination as to whether it has to be tried or not? Well, for the same reason we don't know how the court is going to act once all the evidence has been presented, all the evidence has been submitted, it has been decided on, there is already an award on its merits. Now I tell you, for procedural economy the Court will say, "No, if due to procedural economy that is already resolved, why should we go back and relitigate it." And then, there is the aggravating factor of the merits as such of the controversy.

Look, I'm going to tell you more. This is a case which from the very start, for the employer, is distasteful case on its merits. From the start, we had an entire Legislature which moved quickly to protect this poor worker, without hearing the employer, to protect those free speech rights, how I am going to submit all the evidence on the merits of the case, for me then to go to the Court and say, "Look, this wasn't arbitrable", since that Court also already has all the evidence before it?

In other words, my understanding is that the assertions of arbitrability are distinct from those on the merits and should be heard separately and we should be given that chance. Otherwise, look, I don't know why we agreed then in the collective bargaining agreement to have judicial review on that issue. It would have been better to leave it as an action to set aside the award. The parties foresaw, and this is new this pertains to this collective bargaining agreement, it was not included in the previous agreement; we, the parties, agreed that arbitrability was to be heard in the first instance by an Arbitrator, and would not be conclusive.

Look, is what you determine is that it is arbitrable, and that is not conclusive, I still don't have to actually try it, because since it isn't conclusive, and I have to process it as judicial review and I am entitled to judicial review, even if you determine that it is arbitrable, I don't have to try it. Much less, do I

have to try it now previously, that you tell me I have to try it if what I am asserting is that I don't have to try it. Do you follow me?

I mean, I frankly have no more arguments to give you if we haven't persuaded you so far. But I am very much aware that what we negotiated, because I negotiate it, was that arbitrability was to be decided at first instance, and since those conclusions are neither final nor conclusive, those Arbitrators' decisions regarding arbitrability, on recourse to the Courts through judicial review, and that I haven't waived, I haven't ceded it that is spelled like that expressly in the collective bargaining agreement. How I am going to go into the merits now? That is the letter of the collective bargaining agreement, which is the law between the parties, and it is the law for Your Honor.

Tr. 177, 1.3-11:

ATTY. SOTO:

That the parties agree that your findings when they have to do with arbitrability are not conclusive, that they are reviewable in a Court since they are not conclusive and if they are reviewable in a Court I do not wish to waive that right that I negotiated at the bargaining table. How I am going to waive it here, if I negotiated it, and it took me a lot of work to negotiate it? It was tough to negotiate that clause the whole arbitration clause, which is completely new.

United States District Court
For the District of Puerto Rico

- CERTIFIED -

To be a correct translation prepared by

Illegible
Certified Court Interpreter
Administrative Office of the
United States Courts

[CERTIFIED TRANSLATION]

IN THE ARBITRATION AND CONCILIATION BUREAU

CASINO EMPLOYEES ASSOCIATION OF PUERTO RICO UNION,

V.

CONDADO PLAZA HOTEL & CASINO COMPANY

CASE NO. A.-2270

RE: VICTOR VILLALBA DISCHARGE

COMPANY'S MEMORANDUM

Selection of pages and text where the federal question was raised.

PROLOGUE: (i)

On June 21, 1990 the Honorable Supreme Court of the United States decided the case of *Michael Milkovich v. Lorain Journal Co., et al*, 58 LW 4846. By the time that the opinion of Chief Justice William Rehnquist was published and received in our law office through the Law Week subscription, we had

almost concluded our long Memorandum in support of Victor Villalba's discharge citing extensive jurisprudence about the libel law vis a vis the free speech guarantee, the right to petition and opine on matters of public interest, and the limitations to the First Amendment protection, ending with the leading case in the Federal Supreme Court on disloyalty as just cause for the discharge of an employee and the corresponding public policy in labor cases also protected by the National Labor Relations Act.

It may not have been necessary such an exhaustive position paper if Milkovich had been resolved before. But, although we do not have time to re-write our brief, fortunately this important precedent timely arrived, which is the law of the nation, resolving the issue, not settled before, that the constitutional privilege of the First Amendment of the United States Constitution is not extended to protect a libelous or defamatory opinion. We enclose a copy of the entire Opinion, due to its importance.

BRIEF:

At p. 2: Heading of Topic II

> Neither the Puerto Rico Constitution nor United States Constitution Protect Under the Free Speech Guarantee an Ill-intended Opinion Based on False Facts Known by the Defamer, Not Corroborated Negligently That Damages the Reputation of a Person, which is Constitutionally Protected in Puerto Rico and Under the Common Law of the United States by Interpretation of the American Constitution.

At p. 26: Heading of Topic III

> The Right to Petition Protected as Part of the Right to Freedom of Speech Under the First Amendment of the

United States Constitution and under Section 4 of Article II of the Puerto Rico Constitution Does Not Enjoy a Greater Protection than Other Expressions Under Said Postulates and Equally Give Way to the Right to Reputation in the Just Democratic Balance.

Let us begin by clearly establishing that already the United States Supreme Court rejected in *McDonald v. Smith*, 105 S.Ct. 2787 (1985) the extension of an absolute constitutional privilege to insulate statements made under the right to petition from the responsibility of defamation. On the contrary, in McDonald the court emphasized that:

> "There is no sound basis for granting greater constitutional protection to petitioning than to other First Amendment expressions."

United States District Court
For the District of Puerto Rico

—CERTIFIED—

To be a correct translation
prepared by,

(seal) Thomas H. Kavelin

Certified Court Interpreter
7/4/92
Administrative Office of the
United States Courts

APPENDIX—(v)(d)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

POSADAS DE PUERTO RICO ASSOCIATES INC. d/b/a CONDADO PLAZA HOTEL & CASINO,

Plaintiff,

v.

ASOCIACION DE EMPLEADOS DE CASINO DE PUERTO RICO,

Defendant.

CIVIL NO. 86-0848
ARBITRABILITY
(29 U.S.C.A. sec. 185)

COMPLAINT

COMES NOW Plaintiff, Posadas de Puerto Rico Associates, Inc., represented by the undersigned counsel, and respectfully pleads and prays:

1. Plaintiff is a Delaware corporation, registered as Posadas de Puerto Rico Associates, Inc. and authorized to do business under the laws of Puerto Rico as Condado Plaza Hotel & Casino. The hotel industry is an industry affecting commerce as defined in Section 2(2) of the Labor Management Relations Act as contemplated under section 301 therein. 29 U.S.C.A. 185.

2. Defendant is a labor organization within the meaning of section 301 and as defined in section 2 (5) of the N.L.R. Act. It is the authorized bargaining representative for certain Casino employees of the Hotel.

3. This is an action brought under Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C.A. sec. 185), by reason of which the Federal District Court for the District of Puerto Rico has jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

4. The parties described herein executed a three-year collective bargaining agreement on February 22, 1985 which contains a Grievance and Arbitration Procedure as the peaceful means favoured by the national public policy and labor relations law and cases. (Exhibit 1) Plaintiff has at all times complied with its obligations under the contract, and specifically states that it is its intention to so comply in this and all subsequent cases.

5. On November 1985 Victor Villalba was invited to testify by the House of Representatives regarding House Resolution 102 on the study of the tourism industry in general with a view of adopting or participating in the formulation of the public policy to foster its future development. Villalba was both an employee in Plaintiff's casino and the President of the Defendant Union.

6. Without extending into the full merits of the controversy, Mr. Villalba's position and false statements at the Legislature were destructively directed—knowingly or with wanton disregard—to libel, discredit and adversely affect Plaintiff's reputation and property; and thus, were not protected by the First Amendment of the Constitution of the United States in Plaintiff's view although defended on those grounds by Defendant.

His testimony was contrary to the best interests of the union members, and since disloyalty to its employer has been upheld by the Supreme Court of the United States as the most elemental cause for a discharge under LMRA construction, said speech is not protected under the National Labor Relations Act.

Furthermore, his testimony maliciously or negligently caused immediate damage to Plaintiff, as it triggered the denial of the casino license for the El San Juan Hotel & Casino; later granted while an antitrust investigation was conducted, but only provisionally and without vested rights. This has affected the hotel's borrowing reputation and has caused the denial of certain loans necessary for its operation (31 L.P.R.A. art. 1802).

7. Plaintiff's Rules of Conduct (Exhibit 2) provides for disciplinary action, including dismissal, should the employee be disloyal to the Company and act improperly, in addition to the constitutional and statutory grounds before advanced. Villalba's conduct was not a first but a repetitive offense.

8. The employee was dismissed. He filed an unfair labor practice charge before the National Labor Relations Board, which deferred to the Arbitration procedure but retained jurisdiction in case the employee was not satisfied with the Award (Exhibit 3). The employee has a second opportunity, not available to Plaintiff, should he lose the case.

9. The labor leader's dismissal has become a political question. After the discharge, at least four hearings were conducted by the Legislature to condemn the exercise of Plaintiff's legitimate constitutional rights to protect both its property and reputation. As a reaction, two House bills were introduced: House Bill 740 makes it a misdemeanor to fire an employee who has been called to testify before the Legislature while House Bill 712 amends Act 80 of May 30, 1976 granting total

immunity to any employee who testifies against its employer, regardless of whether or not he commits perjury or defamation (Exhibits 4 & 5).

10. The Secretary of Labor appeared before the Labor Committee on April 4, 1986 to endorse the proposed amendment. Although the Secretary poses a question as to whether all speech will be protected even if malicious or false, he even favors the extension of the protection to judicial testimony (Exhibit 6). On April 8, 1986 the Secretary's representative also endorsed the reinstatement of said employees vis a vis the payment of an indemnization, as in the case of all other unjust causes. To date, we have not been able to obtain a transcript of the hearings.

11. In addition to the aforementioned, Mr. Simeon Villalba, the brother of the discharged employee, is an Arbitrator at the Bureau of Conciliation and Arbitration.

12. Plaintiff's concern of leaving an impartial, fair hearing in a case which raises very serious questions is a legitimate one, under the circumstances.

We raise the question as to whether not only the Arbitrator selected by the parties before the issue became so complicated should abstain from arbitrating this case but whether all the arbitrators of the Bureau should inhibit from this case.

Although the Secretary's opinion is assumed to be independent from those opinions of the Arbitrators that work under him, how much weight it can carry to shift an already unbalanced trial is a meritorious, serious question that with all propriety we must raise before this Court. As counsel, to submit without more to arbitration under these peculiar facts could constitute malpractice in view of the binding effect of the awards.

13. In its effort to comply with the contract, Plaintiff has tried to make use of the right to a private arbitrator paid by

both parties contemplated by the collective bargaining agreement. (Exhibit 7) Defendant has not formally replied but declined said use informally through a telephone conversation stating he will not pay for arbitration when he can have it free. Plaintiff has abstained from offering to pay for the whole procedure to preserve the image of impartiality needed for the confidence of the parties.

14. The Agreement at bar provides that the arbitrability of a dispute will be first resolved by the Arbitrator but is judicially reviewable by the courts. Art. V (8) However, this case presents a two-fold arbitrability attack, one of which cannot be resolved by the Arbitrator.

a. We plead that this case is not arbitrable under the normal grievance procedure, because it was never the intention of the parties to agree to submit constitutional rights to the binding decisions of arbitrators not qualified to ascertain clashing constitutional and legal rights, especially when the contract provides that the award must be rendered in accordance to law. The case is one for the federal courts, or at least for a private arbitrator with legal formation.

b. We plead that this case is not arbitrable at a forum where the announced public policy favors already one of the parties, who in addition has a brother working shoulder to shoulder with any and all of the arbitrators who could be called to arbitrate the dispute, for which reason there is the shadow of a possible conflict in detriment of Plaintiff without the most remote possibility of ascertaining if the decision was colored by any of these extrinsic factors.

15. Under the *Steelworkers* Trilogy cases, even though deference is given to arbitration promises, arbitrability remains a proper inquiry for the Courts. The Agreement between the parties provides in its Article III that:

MANAGERIAL RIGHTS

The Union recognizes management's right to administrate, supervise, direct and control the Casino business, including the selection of personnel, the control and direction of the employees and the adoption and application of reasonable rules; and that the right to supervise, direct, control and administrate the Casino are functions which pertain exclusively to the Management of the Casino and its authorized representatives and that nothing in this Agreement shall be understood to mean that the Employer is deprived of its managerial rights unless said interpretation is required expressly by the provisions of this Agreement.

These administration rights shall not be used by the Employer arbitrarily or capriciously against any employee or group of employees, or for any other purpose of discriminating against the Union or against any of its members, nor for any act which would constitute a violation of the provisions of this Agreement.

16. Rather than await for a suit to compel us to arbitrate, or enforce an award, Plaintiff seeks the impartiality and protection of this Court, and requests a hearing on the merits of our petition. Just as a Judge whose inhibition is requested does not sit to decide the question, neither can the Arbitrator or the Bureau properly decide that issue.

17. Because the review of an arbitration award has been given far more deference than a judgment by a lower court, and is therefore, more difficult to reverse, Plaintiff under the special circumstances of this case cannot voluntarily waive its constitutional rights to a full hearing in Court when his constitutional and legal rights are at stake. The core question in this

case is the balance of free speech rights, if protected, versus property rights and reputation rights—all three guaranteed by the Constitution of the United States.

IN VIEW OF THE FOREGOING, we respectfully request that this Court determines in the first instance whether under the particular circumstances of this case the controversy is arbitrable; and, if arbitrable, whether in equity and in law a private arbitrator, as contemplated by the Agreement, should be the proper alternative to assure the fairness that permeates our democratic system of justice.

RESPECTFULLY SUBMITTED, in San Juan, Puerto Rico, this 30th day of May, 1986.

María Milagros Soto

221 Ponce de León Avenue
Banco Central Suite 815
Hato Rey, Puerto Rico 00917
Tels. 754-1920, 754-1717

Received & Filed
1986 May 30 PM 4:02
Clerk's Office
U.S. District Court
San Juan, P.R.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

POSADAS DE PUERTO RICO ASSOCIATES INC. d/b/a
CONDADO PLAZA HOTEL & CASINO,
Plaintiff.

v.

ASOCIACION DE EMPLEADOS DE CASION DE PUERTO RICO,
Defendant.

CIVIL NO.
ARBITRABILITY
(29 U.S.C.A. sec. 185)

VERIFICATION

I, Carl Kortum, of legal age, married and resident of Carolina, Puerto Rico, as Plaintiff's Vice-President for Casino Operations HEREIN DECLARE:

1. That my personal circumstances are as above stated.

2. That the preceding Complaint requesting a Court Arbitrability determination under section 301 of the National Labor Relations Act has been prepared by counsel according to our instructions and reflect truly and correctly the facts pertinent to the controversy as alleged therein.

3. That I have read it thoroughly and that the facts as alleged are true, except what I know through information and belief and that I also believe to be true.

In San Juan, Puerto Rico this 30th day of May, 1986.

Carl Kortum

Affidavit Number: 133

Sworn and subscribed to before me by Carl Kortum, of the personal circumstances beforementioned, and whom I personally know, in San Juan, Puerto Rico on May 30, 1986.

Pablo Alvarez
Notary Public

Seal

Appendix (v)(e)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

POSADAS DE PUERTO RICO ASSOCIATES, INC. d/b/a
CONDADO PLAZA HOTEL & CASINO,
Plaintiff.

VS.

ASOCIACION DE EMPLEADOS DE CASINO DE PUERTO RICO,
Defendant.

CIVIL NO. 86-0848 (HL)
ARBITRABILITY 929 USCA Sec. 185

MOTION REQUESTING STAY OF ARBITRATION PROCEEDING

TO THE HONORABLE COURT:

COMES NOW plaintiff, Posadas de Puerto Rico Associates, through the undersigned attorneys and very respectfully alleges and prays:

1. On May 30, 1986 the plaintiff filed the complaint in the above-captioned case presenting to the Court a question of substantive arbitrability to be resolved under the procedure provided by § 301 of the National Labor Relations Act.

2. Pending this case, plaintiff appeared at an arbitration hearing scheduled on *June 2, 1986* and presented to the Arbitrator the same questions posed by this complaint, requesting the voluntary stay of the arbitration procedure by the Conciliation Bureau.

3. The Arbitrator considered that the issues presented were not for him to resolve since the inhibition of the Conciliation Service was one of the questions presented and only the Director of the Service could judge its propriety. The parties agreed to submit that question to the Director's opinion before proceeding any further.

4. On August 1, 1986, Jaime Belgodere, the Director of the Bureau, issued his opinion, a copy of which is enclosed as Exhibit A, and returned the case to the Arbitrator for continuation of the proceedings.

5. The Arbitrator has scheduled the hearing for September 23, 1986 and should we enter to try the case, the Court complaint would be academic. Exhibit B.

6. The Supreme Court of the United States in the case of *AT&T Technologies, Inc. v. Communications Workers*, 106 S.Ct 1415 (1986), restated the standard doctrine that the question of arbitrability is for the courts to decide.

WHEREFORE, we respectfully move the Court that *as an auxiliary measure to its jurisdiction it stay the arbitration and/ or order defendant to refrain to pursue the arbitration procedure hearing scheduled for September 23, 1986 until the Court is allowed to exercise its jurisdiction on a federal question.*

RESPECTFULLY SUBMITTED, in San Juan, Puerto Rico, this 8th day of September, 1986.

CERTIFICATE OF SERVICE: On this same date copy of this Motion was sent to Jose E. Carreras Rovira, Esq., 528 Ponce de Leon Ave., Arroyo Building, Suite 304, Hato Rey, Puerto Rico 00917.

Maria Milagros Soto

Yolanda V. Toyos Olascoaga

Maria Milagros Soto Law Office
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1986 SEP 11; AM 11:37
CLERK'S COURT
U.S. DISTRICT COURT
SAN JUAN, P.R.

Appendix (v)(e)(2)

Decision.

9/17/86

Denied.

H.L.
U.S.D.J.

Received & Filed
1986 SEP 07; PM 2:55
CLERK'S COURT
U.S. DISTRICT COURT
SAN JUAN, P.R.

APPENDIX—(v)(f)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

POSADAS DE PUERTO RICO ASSOCIATES, INC. d/b/a
CONDADO PLAZA HOTEL & CASINO,
Plaintiff,

vs.

ASOCIACION DE EMPLEADOS DE CASINO DE PUERTO RICO,
Defendant.

CIVIL NO. 86-0848 (HL)

MOTION

TO THE HONORABLE COURT:

COMES NOW plaintiff CONDADO PLAZA HOTEL AND CASINO through the undersigned attorney and very respectfully alleges and prays as follows:

1. On September 26, 1986, an arbitration hearing was held at the offices of the Conciliation and Arbitration Bureau. At said hearing, upon the denial of our petition for stay of the arbitration procedures until this case be tried, the appearing party offered to submit the issue of arbitrability to the arbitrator, for first instance determination, subject to Court revision as provided under the Collective Bargaining Agreement.

2. That notwithstanding the appearing party's objection, the arbitrator ruled that he was going to enter not only into the arbitrability issue of the dispute but also into the merits of the dispute.

3. We objected to the aforementioned ruling, because the above captioned case, which is of declaratory and injunctive nature, would turn moot if we agree to arbitrate the merits, and we believe we have taken the affirmative action recommended by the Supreme Court cases to preserve our rights.

4. The Arbitrator further ruled that if we chose to insist on a prior Court determination, he would hear the case *ex parte*. The Collective Bargaining Agreement contemplates *ex parte* proceedings only when a party does not show which is not the case here. We have a controversy which is a federal question properly submitted in this Court, have requested a stay that was denied and have taken every diligent effort to act in accordance to law.

5. Unless the Court issues a stay, at least of the trial of the merits of the controversy, Plaintiff will be deprived of due process as entering trial of the total controversy would be equivalent to have the Court decide the case without hearing us. The core issue is whether the merits of this case was a subject of arbitration. We can understand a denial of our first motion for a stay because the contract does provide that arbitrability will first be decided by the arbitrator. But hearing the case *ex parte* is an abuse of authority by the Arbitrator that invades the most basic notion of our constitutional Court system. Plaintiff will be forced to submit to arbitrate the merits because it cannot risk an *ex parte* proceeding. By submission, the corollary review is the consequence.

WHEREFORE it is respectfully requested from this Honorable Court that it stay the arbitrator from entering into the

merits of the arbitration case, without first determining whether the case is arbitrable, and giving the Court the opportunity to review said determination according to the provisions of our contract.

Respectfully submitted, in San Juan, Puerto Rico, this 14th day of October, 1986.

CERTIFICATE OF SERVICE: On this same date a copy of this Motion was sent to Jose E. Carreras Rovira, Esq., 528 Ponce De Leon Avenue, Arroyo Bldg., Suite 304, Hato Rey, Puerto Rico.

Maria Milagros Soto
Banco Central - Suite 315
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Received & Filed
1986 Oct 15 PM 1:55
Clerk's Office
U.S. District Court
San Juan, P.R.

ORDER

10-23-86: Denied. Plaintiff's right to obtain a Court determination of the arbitrability issue is not waived by going through the arbitration proceedings. An arbitration award may be received under Section 301 of the Labor Management Relations Act. See 456 F.2d 183 (1st Cir. 1972). This court's review may well become moot if plaintiff prevails at the arbitration hearing.

H. L.
U.S.D.J.

APPENDIX (v)(g)

IN THE PUERTO RICO SUPREME COURT

CONDADO PLAZA HOTEL & CASINO,

Defendant-Petitioner,

vs.

PUERTO RICO ASSOCIATION OF CASINO EMPLOYEES,

Plaintiff-Respondent.

CE-91-690 ADMINISTRATIVE REVIEW

MOTION FOR RECONSIDERATION

TO THE HONORABLE PUERTO RICO SUPREME COURT:

Comes now Condado Plaza Hotel & Casino through the undersigned attorney and very respectfully prays for reconsideration of the Judgment entered on January 17, 1992, filed on record and notified on January 21, 1992.

GROUNDS

Under the discretion granted by Rule 50 of the Supreme Court Regulations, 4 LPRA Ap. I-A, our Petition for Review in this case was ruled upon by a Judgment based on the partial record submitted with the Petition, which was quite superficial

as regards the argumentation of the errors asserted, due to the 20-page regulatory limitation, of which 6 pages were devoted to the Court's jurisdiction, to the identification of the Judgment for which review was being prayed and to the Summary of Facts in this case.

We were relying on the opportunity to file a Brief under Rule 19 of said Regulations in the face of the substantial issues of constitutional law in conflict in this case; and before the novel situation that arose when this Court finally upheld, by not issuing the writ of review in Case Number CE 91-616, that the Bureau of Conciliation and Arbitration of the Department of Labor, and Arbitrator Juan T. Rodríguez were enjoined from ruling on the merits of Mr. Víctor Villalba's dismissal.

Although this High Forum undoubtedly has the discretion conferred upon it by Rule 50, "in situations not contemplated by the Regulations", to conduct proceedings without observing the specific terms or procedures in the manner which in its judgment serves the best interests of all parties, with all due respect to this High Court, we consider that this IS NOT a case not contemplated by the Regulations nor a case in which the best interests of ALL the parties are served by following the exceptional procedure. Consequently, we consider that the use of Rule 50, *supra*, is not justified, especially when this Honorable Court reaches some erroneous determinations of facts by relying on a record which was never submitted to the Superior Court—in spite of our prayer to order the Bureau of Conciliation and Arbitration to submit it, App. VII, p. 524—for which reason it was likewise unavailable for this court's benefit.

In the only procedent which we find under this Rule, *Rivera Pérez v. Carlo Aymat*, 104 DPR 693 (1976), Associate Justice Diaz Cruz explained that Rule 50 was used because the transcription of the testimonial evidence and a brief in opposition to the petitioned review were submitted. In contrast to *Rivera*, in our case our petition for the record to be submitted by the Bureau of Conciliation and Arbitration was not granted. We

cannot force a Court to ask for an arbitration record; the most we can do is pray. Unfortunately, the experience has been that, even though administrative agencies and the lower courts are requested to submit a record in a review, arbitrators are not normally required to furnish proof that their determinations of fact are substantiated by the entirety of the record. One thing is the doctrine of deference to the awards; and another thing is to extend Arbitrators a blank check . . . especially when the parties agreed only to a limited use of the arbitration forum ON THE CONDITION that the award BE IN ACCORDANCE WITH LAW.

In this second case in which there were 18 hearings and 74 Exhibits of Condado Plaza comprising various sub-exhibits, including statistical tables and graphs and other evidence to demonstrate the damages and why the statements made by Mr. Víctor Villalba in the abuse of the power of expression were false and intentionally damaging, the most we could do was a narrative summary of the evidence based on the official record in an effort to—at least—afford Condado Plaza due process of law at some stage in the abortive proceeding which was followed in this case at the arbitration level, with forked pathways in the Superior Court, which were only intercepted at the level of this Honorable Court.[1]

[1]At page 4 of the Judgment, footnote #1, the Court appears to indicate that since appeal number CE-91-616, concerning arbitrability and the disqualification of Arbitrator Rodríquez, was not before its consideration, it cannot stake that case into account in ruling on this one. We cannot subscribe to this reasoning when this is the only forum(other than submitting both cases jointly to the United States Supreme Court), in which there can and should be judged in equity and in law the impact which the finality of the first award and judgment has on the second award which SHOULD never have been issued under the clear letter of the collective bargaining agreement which allowed the full judicial review of the Alicea's Judgment which this Court made final and definitive by not issuing the first order prayed for. Justice IS NOT BLIND, however it may be so portrayed. The result of the first award should be considered in handing down an opinion on the second case, because it has specifically been brought for consideration by this Honorable Court.

When it is raised to the Superior Court that as a question of law the substantial evidence in the official arbitration record does not uphold the findings of fact of the award, the only way the Court can adequately evaluate such a question of law and determine if judicial review is warranted on these grounds, is by examining the record. Here the lower Court was unable to fulfill its responsibility under the doctrine of this Court which we have already cited in abundance in our Petition, because it failed to ask for the record which appeared in official transcriptions accepted by both parties in the proceeding. Hence, we object to the use of Rule 50 as a vehicle to rule on this case. Hence, we pray for the reconsideration of a Judgment which relies on erroneous grounds which we will identify by way of illustration, though not exhaustively.

On Page 6 of the Judgment, the Honorable Court rules:

> . . . Assuming that respondent's conduct had constituted a violation, in the case before us *it was not demonstrated to the Arbitrator that Mr. Villalba's testimony had negatively affected petitioner's business. Such demonstration cannot be made in the process of judicial review . . .*"
>
> What was not demonstrated to the Arbitrator?

We devoted more than five hearings to proving the mediate and immediate damages to petitioner's business. We devoted several more to demonstrating that at least thirteen statements in the address were false and defamatory . . . and that Mr. Villalba KNEW THAT THEY WERE FALSE.

It wasn't before the Superior Court that the evidence was presented.

We know all too well that evidence which has not been presented in the initial proceeding in whatever forum cannot be introduced on appeal. In the Petition for Review in the lower court and before this Court, we submitted an exact

reference to the pages of the summary of evidence which supported both points which the Court of instance, and now this Honorable Court, determined had not been proven.

In order to demonstrate how erroneous such determinations are, we submit as Exhibit A of this Motion, the entire testimony of Mr. Manuel Sarmiento, Assistant Secretary of the Treasury, who agreed to serve as witness for us before the arbitrational forum; and who fully stated that he denied the casino license to Williams Hospitality for the Hotel San Juan which was scheduled to be inaugurated ten days later . . . that he did so on the basis of Villalba's statements published in the press accusing his employer of monopoly . . . and, that even when he later issued a "provisional" license, [Exhibit 42 A and B before the arbitration forum], he issued it ON CONDITION THAT AN INVESTIGATION CONCERNING VIOLATION OF THE LAW OF MONOPOLY BE CONDUCTED without Williams obtaining any right to question the eventual denial, which condition was in force for the space of one year. (Hearing of September 8, 1989, pp. 3 to 31 of the official transcript subscribed by Crespo and Rodríguez].

Just as a completely neutral witness offered evidence before the Arbitrator, one who field the position on the date of the mediate and immediate damage related to the granting of a franchise (which we had already been notified to send to be picked up the day before Villalba's statements), Mr. Hugh Andrews also testified extensively before the Arbitrator. We are in a position to demonstrate to the Court on what pages of the official transcript such evidence appears, even though we are not submitting it in its entirety as we did with that of Mr. Sarmiento because of the volume that to so submit would represent. Nevertheless, we plead that the case be returned to the Superior Court in order for it to request the case record; or, that within the broad powers which this High Court has, it order the Bureau of Conciliation to submit it directly to the High Court.

The following damages arise from the evidence presented to Arbitrator Rodríguez with reference to the date of the hearing and page of the official record in the possession of the Bureau of Conciliation and Arbitration:

—Public humiliation of Mr. Hugh Andrews, who was present while Villalba was deposing, upon hearing false accusations against his company without being able to measure at the time what consequences or damages he might be caused; and not thinking at the time of disciplining the disloyal employee who was gratuitously offending him but rather in how the damage he was causing could be repaired. [Hearing of October 20, 1987, TR 102-104, 107; hearing of January 22, 1988, TR 9, 14-15.

—Immediate denial of the Hotel San Juan's casino license scheduled to open on December 10, 1975. Villalba was not disciplined for his statements but only when it caused Williams the damage of the denial of the license, on the day following the address. (Hearing of January 22, 1988, TR 16-17, hearing of June 28, 1988, TR 23; hearing of September 9, 1988, TR 72; Exh. 42]

—Delay for the space of two years in obtaining the permanent financing for the Hotel San Juan inasmuch as no bank wished to finance $30 million without the certainty that the casino license would assuredly be issued in the face of-the investigation announced and the provisional nature of the license without the right to judicial review since the bondsmen's guarantee depended on the income from the casino. [Hearing of December 1, 1987, hearing of January 22, 1988; hearing of September 27, 1988, TR 87-89, 93-94; TR 16-18, 26-27; TR 19; hearing of October 7, 1988, TR 59-60]

—Financial difficulties in the operation as the result of the delay in the issuance of the bonds for the permanent financing since it was not known whether they were going to be able to fulfill commitments. [Hearing of January 22, 1988, TR 18]

—Loss of other opportunities for Williams since other investors interested in having Williams manage their casino were afraid of choosing them and that the government would not approve their project in the face of Villalba's accusations and the spectre of monopoly which he raised—which limitation in company expansion was still alive at the time Andrews presented his testimony, providing specific examples of firms which had approached him and expressed their concerns. [Hearing of January 22, 1988, TR 20-21, 28-30]

—Due to the fact that 50% of Williams stock belong to a public corporation listed in the New York stock market, when the news was published, the Board of Directors suffered a great scare upon having to respond to the shareholders; and Mr. Andrews had to appear before them at the annual shareholders' meeting to explain the situation. [Hearing of January 22, 1989, TR 26-28]

—As a result of Villalba's statements, the Legislature ordered an investigation of Williams and submitted three bills. [Exh.'s 1, 2, 4, 29]

a. One to make it a crime for an employer to dismiss an employee for his statements in the Legislature. [did not pass]

b. Another one to add as an unjustified cause in Act 80 of May 30, 1976, as amended, the dismissal of an employee for statements made against his

employer. {It passed and the Court cites it on page 5 of its Judgment}.[2]

c. And a third bill aimed at not permitting any casino to have more than 50% percent of the market; levying a tax on any excess above the 50% which to be defeated entailed the personal involvement of Mr. Andrews—with the concomitant loss in time and money—in meetings at the legislative level with Mr. Miguel Hernández Agosto; and at the executive level, with the Hon. Rafael Hernández Colón; since what Villalba was proposing was that success be penalized and the development of tourism in Puerto Rico be held back. [Hearing of October 7, 1988; TR 30, 40-42, 60-61]

—Investigations by the Board of Environmental Quality because of the accusations of the alleged conditions in the casino, which after all resulted favorable to Condado Plaza, demonstrating that the accusations were false and aimed at causing the employer discomfort and harm. [Hearing of January 22, 1988, TR 10-11]

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[2]At the time of the dismissal, there was no prohibition in our judicial ordinances which gave due notice to the employer that he could not dismiss an employee for his statements before the Legislature, especially if they were false and caused damage . . . wherefore the public policy cited and the law are *a posteriori*, and was [*sic*] passed by the Legislature precisely in reaction to the specific case of Villalba without ever giving the employer an opportunity to state that it was not because he made an appearance to testify concerning his points of view on tourism that he was dismissed, but because he addressed his entire address full of false facts to publicly criticize his employer, when he could have expressed his points of view in general without damaging the good name and reputation of Andrews and Williams, wherefore it was evident that his purpose was not to contribute his ideas in the marketplace of ideas but rather to plead for Williams not to be given subsidies and loans, to request, that the expansion of their businesses be limited, and to cause damages which were not only foreseeable but desired, in gross disloyalty to the hand that feeds him.

Therefore an examination of the record shows SUBSTANTIAL UNCONTROVERTED evidence OF DAMAGES AT THE LEVEL OF THE ARBITRATOR. The record likewise supports that Condado Plaza painstakingly analyzed one by one the statements of its employee against it and presented evidence of their falseness with documentary evidence in addition to testimony, a partial summary of which we are submitting for consideration to this Honorable Forum since the objective is not to cover the entire evidence, but to provide the Court with some real parameters based on the placement in the record of some of the statements proven to be false and defamatory.

— Villalba accused Williams of controlling the Tourism Company (Frances Ríos de Morán) and the Legislature. Andrews proved that Hon. Rafael Hernández Colón attracted Williams in 1977 to invest in the Condado Holiday Inn but the one who promoted the expansion and the bridge to the Hotel Flamboyán was the Hon. Carlos Romero Barceló. In this phase the Director of Tourism were *[sic]* Joel García and the Director of Gaming, Víctor Molina—the persons who gave him more trouble by fining him four times and giving rise to the decision about the casino advertisements. Relations with Frances Ríos de Morán were very bad because she took the lawsuit on casino advertising personally. On the other hand, Romero Barceló wanted to eliminate the slot machines. The purchase of the El San Juan was initiated during the administration of the NPP; but the deal was closed and the hostelry was inaugurated under the PDP. Andrews does not have the power to control such highly-placed personalities from both political parties. [Hearing of September 24, 1987; TR 15-16, 77.]

— While Villalba said that Williams was monopolistically expanding while other operations were in crisis and closing down, the graphs showed that in 1985 tourism in Puerto Rico was finally in recuperation, reflecting a considerable occupancy increase of 62 to 73% and demonstrating not only the success of Condado Plaza but of Puerto Rico as a tourist destination. [Hearing of September 24, 1987, TR 86]

— While Villalba accused Williams of REDUCING at least 100 jobs with the adoption of new work shifts; Andrews demonstrated with graphs and tables published by the government, the continuous growth year by year until 1987—when that hearing was held and in spite of the fact that Villalba gave his address in 1985—that Williams Hospitality over the years has consistently created and INCREASED jobs for Puerto Ricans, including at the Condado Plaza, of which Villalba is aware because he receives lists of employees with the withholding of growing Union dues. On the date of the hearing, it had around a thousand employees; the payroll having doubled from around two million in 1977 to more than four million in the CASINO ALONE. [Hearing of September 24, 1987, TR 111-11, 125, 128-9, 151, 160, Exh.'s 48 (A) and (B), 49 (A) and (B)]

— Specifically in the year in which the collective bargaining agreement was negotiated (February 22, 1985) the casino payroll was $3.4 million; and while in November of 1985 Villalba was saying that Williams was reducing jobs and abusing his workers, the evidence demonstrates that in the year following the signing of the collective bargaining agreement, the casino payroll increased to $4.3

million as did the number of employees DOUBLE as well. [Hearing of September 24, 1987, TR 130-135; Exh. 50]

— Villalba accused Williams of monopolizing gambling by controlling 50% of gaming at Condado Plaza; 5% at Palmas del Mar; and anticipating that the El San Juan would corner 34% and hence the rest of the casinos put together would share the difference. Andrews presented evidence that in 1985 Condado Plaza had a 34% market share; that Palmas had never had 5% and up to that date had only suffered losses; and that when the El San Juan opened Williams would not corner 88% of the market because it does not work that way. He proved that Villalba based himself on a premise that the market was static and that, therefore, if the participation of one casino increased, the share of the others would decrease. The comparative data which were produced for the Arbitrator, proved that—even with the opening of the Sands—each casino generates more market; and that even the Condado Plaza's market share WAS REDUCED when more participants entered the market, although in absolute terms the volume of gaming and profits had increased. Therefore, it was false that Williams had monopolized gaming in November of 1985 as it was still false in 1987 with the advent of the Hotel Sands and its own El San Juan Hotel because the gaming market IS NOT PUERTO RICO, but THE WHOLE WORLD. [Hearing of September 24, 1987, TR 135-137, 146-149, 173-4; hearing of September 30, 1987, TR 53-56, hearing of October 20, 1987, TR 39; Exh. 51]

— It is not true that Williams had influence over the Legislature to increase gaming limits in 1982 because by that date Williams Hospitality did not exist nor did Williams Electronics have any shares in a hotel in Puerto Rico. Moreover, the process for amending the gambling regulations were initiated in the Tourism Company, when the Board of Directors sends a project to the Governor, who if he approves it, sends it to the Legislature, which must pass it by unanimity or by inaction, a veto from one of its chambers sufficing to defeat the bill. The Hotel Association asks for changes on behalf of the entire industry, and appears at the hearings to endorse or oppose the governmental amendments ON BEHALF OF ALL OF ITS MEMBERS. In 1982, the industry backed the government-proposed amendments 100%—but it was neither Andrews in his personal capacity nor Williams which became part of Puerto Rico in 1983. In 1985, industry application limits were once again increased, with Jag Mehta as the Association President. By that date, due to how busy he was with the Hotel San Juan project, Andrews was not actively participating in the Hotel Association. [Hearing of September 24, 1987, TR 18-22, 26-28, 37; hearing of September 30, 1987, 89, 90, 91]

— It was false that Williams received government subsidies while reducing jobs. The government of Puerto Rico has never subsidized Williams as it subsidizes, e.g. the Caribe Hilton, to which it provides the physical plant, furnishings, renovation of its facilities, parking, etc., without the Hilton chain having to invest a single dime in Puerto Rico. Neither did the government lend money for the acquisition and construction of the Hotel San Juan.

> Merely the Banco de Fomento (Development Bank) took part, together with five other banks, in the transaction to guarantee the issuance of bonds—not a subsidy—and as long as Williams complies with its financial obligations, as it has always done in the 16 years that it has been operating in Puerto Rico, the Government Bank does not contribute a single dime. [Hearing of September 24, 1987, TR 46-52]

As we have said *ante*, we cannot and should not be exhaustive in a Motion for Reconsideration. We respectfully pray . . . that this High Forum should reconsider its Judgment and harmonize the constitutional rights of the parties. We respectfully consider . . . that by failing to grant the writ of certiorari in Case CE-91-616 it lends finality to the finding of Judge Wilfredo Alicea that neither Arbitrator Juan T. Rodríguez nor the Bureau of Conciliation could rule on the merits of the dismissal, hence this award is null and void. Otherwise, there is a clear clash between the two decisions. We sustain . . . that the dismissal of Víctor Villalba is justified under Law 80, as it existed at the time of the dismissal; and, under the doctrine of this Honorable Court. *Secretario del Trabajo v. I.T.T. Western Hemisphere Industries*, 108 DPR 536. In that case the Honorable Court stated that Law 80 provided:

> "That dismissal which is done out of mere caprice on the part of the employer or without a reason related to the good and normal functioning of the establishment, shall not be considered just cause."

Therefore, by interpreting the *numerus apertus* of the aforecited law, this High Court stated:

> "Then, by merely inverting the syntax, we find that it will not be considered a just cause for a dismissal that

which originates not from the free arbitrariness of the employer, but from a reason linked with the orderly progress and normal functioning of the company."

The broad, substantial and clear evidence in the record shows that the dismissal of the employee was not due to the employer's *mere caprice*.

Víctor Villalba was not dismissed until a real and palpable damage was produced, duly supported by documentary and testimonial evidence: THE DENIAL OF THE CASINO LICENSE. The cause was closely related to the orderly progress and normal functioning of the company.

Under Act 80 . . . even without going into the substantial issue of constitutional rights present in this case . . . the dismissal warranted being upheld due to the employee is serious and repeated disloyalty (this is not a case of a single isolated act), aimed at harming his employer and arresting its economic development in Puerto Rico.

In San Juan, Puerto Rico, on February 3, 1992.

LAW OFFICES OF MARIA MILAGROS SOTO

[Signature]
22 Yardley Place—Suite 200
Santurce, Puerto Rico 00911
Phone 728-2077 Fax: 728-1190
Bar Association No.: 5513

CERTIFICATION

On the same date as the filing of this Motion we are sending a copy by ordinary mail to legal counsel for the Association and Arbitrator Juan T. Rodríguez at their respective addresses of record.

LAW OFFICES OF MARIA
MILAGROS SOTO

[Signature]
22 Yardley Place—Suite 200
Santurce, Puerto Rico 00911
Phone 728-2077 Fax: 728-1190
Bar Association No.: 5513

United States District Court
For the District of Puerto Rico

—CERTIFIED—

To be a correct translation prepared
by,

(Illegible)

Certified Court Interpreter
Administrative Office of the 6/22/92
United States Courts
[Exhibits Omitted]

SWORN STATEMENT

—I, *LESBY GIL VELEZ*, of legal age, single, and a resident of San Juan, P. R., under oath state:

1. I work with Mr. Daniel Tomlinson as his Associate.

2. That Mr. Tomlinson is on a business travel out of the Island.

3. That Mr. Daniel Tomlinson, my Associate, has translated the following original documents from Spanish to English which documents will be used for Petitions for Certiorari to be filed in the U. S. Supreme Court:

Arbitrator Award	A-1036	- Mar. 8, 1991
Judgment-Sup. Court	KAC-91-0542	- Aug. 21, 1991
Notif. & Judgment	KAC-91-0542	- Aug. 27, 1991
Request for Review	CE-91-616	- Sept. 24, 1991
Notification/Rule 50	CE-91-690	- Sept. 25, 1991
Judgment-Sup. Court	KAC-91-0543	- Sept. 25, 1991
Notif. & Judgment	KAC-91-0543	- Sept. 26, 1991
Petition for Review	CE-91-690	- Oct. 25, 1991
Notification/Ruling	CE-91-616	- Nov. 1, 1991
Ruling	CE-91-690	- Nov. 1, 1991
Notification	CE-91-616	- Nov. 5, 1991
Notification/Ruling	CE-91-616	- Dec. 6, 1991
Notification	CE-91-616	- Dec. 10, 1991
Notification	KAC-91-0542	- Dec. 18, 1991
2nd Motion for Recons.	CE-91-616	- Dec. 24, 1991
Notification/Ruling	CE-91-616	- Jan. 10, 1992
Judgment Rule 50	CE-91-690	- Jan. 17, 1992
Notification	CE-91-690	- Jan. 21, 1992
Ruling	CE-91-690	- Feb. 21, 1992
Notification/Ruling	CE-91-690	- Feb. 21, 1992
Notification	CE-91-690	- Feb. 24, 1992

4. That Mr. Tomlinson certified, by including his seal, certification, date and signature in each of the above mentioned documents, which were true and correct translations of the originals in Spanish.

WHEREFORE, for all legal purposes I issue this sworn statement in San Juan, Puerto Rico, this 17th day of July, 1992.

LESBY GIL VELEZ

—Affidavit Number: 22

Sworn and subscribed to before me by Lesby Gil Vélez, of the above described legal circumstances, personally known to me in San Juan, Puerto Rico, this 17th day of July, 1992.

NOTARY PUBLIC

(Seal) CLARIBEL ORTIZ RODRIGUEZ
PUERTO RICO
LEX

SWORN STATEMENT

—I, *JUAN LLAGASTERA YAñEZ*, of legal age, married, Certified Translator and resident of Carolina, Puerto Rico, under oath state:

1. That I have been certified by the U.S. Court as a translator.

2. That I have translated the following original documents from Spanish to English which documents will be used for a Petition for Certiorari filed in the U.S. Supreme Court:

Petition for Review
Superior Court-Arbitration - KAC-91-0542

Petition for Review
Superior Court-Discharge - KAC-91-0543

3. That I certify that the above mentioned documents are a true and correct translation of the original in Spanish.

WHEREFORE, for all legal purposes I issue this sworn statement in San Juan, Puerto Rico, this 17 day of July, 1992.

JUAN LLAGASTERA YAñEZ

—Affidavit Number: 21

Sworn and subscribed to before me by Juan Llagastera Yañez, of the above described legal circumstances, personally known to me in San Juan, Puerto Rico, this 17 day of July, 1992.

NOTARY PUBLIC

(Seal)

CLARIBEL ORTIZ RODRIGUEZ
PUERTO RICO
LEX

SWORN STATEMENT

—I, *THOMAS H. KAVELIN*, of legal age, married, Federal Certified Translator, and a resident of San Juan, Puerto Rico, under oath state:

1. That I have been certified by the Administrative Office of the U.S. Court as a translator.

2. That I have translated the following original documents from Spanish to English which documents will be used for a Petition for Certiorari filed in the U.S. Supreme Court:

Partial Transcript of Hearing		- Sept. 26, 1986
Partial Transcript of Hearing		- June 2, 1986
Arbitration Award	A-2270	- March 8, 1991
Notice of Judgment	KAC-91-0543	- Sept. 25, 1991
Judgment-Superior Court	KAC-91-0543	- Sept. 25, 1991
Motion of Rehearing	CE-91-690	- Feb. 3, 1992

3. That I certify that the above mentioned documents are a true and correct translation of the original in Spanish.

WHEREFORE, for all legal purposes I issue this sworn statement in San Juan, Puerto Rico, this 15 day of July, 1992.

THOMAS H. KAVELIN

—Affidavit Number: 20

Sworn and subscribed to before me by Thomas H. Kavelin, of the above described legal circumstances, personally known to me in San Juan, Puerto Rico, this 15 day of July, 1992.

(Seal)

CLARIBEL ORTIZ RODRIGUEZ
NOTARY PUBLIC

CLARIBEL ORTIZ RODRIGUEZ
PUERTO RICO
LEX
Abogada - Notario

Supreme Court, U.S.
FILED
AUG 31 1992
OFFICE OF THE CLERK

No. 92-201

In The

Supreme Court of the United States

October Term, 1992

CONDADO PLAZA HOTEL & CASINO,

Petitioner,

v.

ASOCIACION DE EMPLEADOS DE CASINO DE PUERTO RICO CONCILIATION AND ARBITRATION BUREAU, AND ARBITRATOR JUAN T. RODRIGUEZ,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Puerto Rico

RESPONDENT'S BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1) Whether the Supreme Court of Puerto Rico erred in affirming a Superior Court Judgment upholding an arbitration award rendered according to prevailing labor law doctrines.

2) Whether a party to a labor arbitration proceeding can relitigate before this Court questions of fact already solved by the arbitrator at said proceeding and affirmed by State Courts.

STATEMENT OF PARTIES

The parties in the proceedings below were Asociación de Empleados de Casinos, a labor organization representing Condado Plaza Hotel & Casino employees; the Conciliation and Arbitration Bureau of the Department of Labor and Human Resources of the Commonwealth of Puerto Rico; and Juan T. Rodríguez, an arbitrator in said Bureau.

Petitioner was Condado Plaza Hotel & Casino, a corporation organized under the laws of the State of Delaware.

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No. 92-201

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ASOCIACION DE EMPLEADOS DE CASINO DE PUERTO RICO CONCILIATION AND ARBITRATION BUREAU, AND ARBITRATOR JUAN T. RODRIGUEZ,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Puerto Rico

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE COURT:

The respondent, Asociación de Empleados de Casino de Puerto Rico,[1] represented by its attorneys, respectfully prays that this court deny the Petition to Review the Judgment of the Supreme Court of Puerto Rico in this case.

[1] From hereon Respondent will be referred to as the Union.

OPINION BELOW

The Puerto Rico Supreme Court Judgment at bar affirms a judgment in Case No. KAC-91-0543 by Superior Court Judge, Angel F. Rossy, entered on September 25, 1991 affirming the award rendered in Case A-2270 on March 8, 1991 by arbitrator Juan T. Rodríguez. In the award, arbitrator Rodríguez decided that Petitioner's dismissal of the Union President, Mr. Víctor M. Villalba[2], was not justified. Petitioner was ordered to reinstate him immediately to his job and to pay all unearned wages, pursuant to the provisions of the collective bargaining agreement.

JURISDICTION

The jurisdiction of this court has been invoked pursuant to 28 U.S.C. sec. 1258. The Respondent agrees that there is jurisdiction in this Court to review the final judgment of the Supreme Court of Puerto Rico.

STATEMENT OF THE CASE

Villalba was an employee of the Condado Plaza Hotel & Casino and President of the Casino Employees Association. In that capacity he was summoned to testify before the Tourism Committee of the House of Representatives

[2] From hereon Mr. Victor M. Villalba will be referred as Villalba.

for the Commonwealth of Puerto Rico in hearings scheduled for November 27, 1985. The summons was issued in compliance with House of Representatives Resolution No. 102, of March 8, 1985, through which the Committee of Tourism, Commerce and Industry and Labor and Veterans Affairs was ordered to conduct a study regarding the Puerto Rican tourism industry. At the hearings Villalba appeared in his capacity as President of the Casino Employees Association, and read a statement regarding the matter for which he was summoned. The statement was transcribed and integrally incorporated in the Award which is the subject of review. Mr. Hugh Andrews (hereinafter "Andrews"), President of the Petitioner Hotel also appeared and testified. Three days after Villalba had testified, through letter dated November 30, 1985, signed by Andrews, in his capacity as President of the Condado Plaza Hotel, by Carl Kortum as General Manager of the Casino, and by Homero San Antonio in his capacity as Operations Manager of the Casino, Villalba was notified of his dismissal effective that same day. As grounds for the action taken it was indicated that the information given in his statement to the legislature was false, destructive, disloyal and contrary to the interests of the employees that he represented.

After an arbitration hearing lasting sixteen days and based on the evidence submitted by the parties, in particular, on the content of the statement read by Villalba, the arbitrator issued his Award deciding that the statement and representations by Villalba before the House of Representatives were not defamatory not did they constitute grounds for taking disciplinary action against him. As

consequence the arbitrator decided that Villalba's dismissal was unjust and ordered his reinstatement.

On April 8, 1991 Condado Plaza Hotel & Casino filed a Petition for Review in the Superior Court of Puerto Rico.[3] On September 25, 1991 Superior Judge Angel F. Rossy sustained the validity of the Award. On February 24, 1992 the Supreme Court of Puerto Rico denied a motion for reconsideration of its January 17, 1992 judgment which affirmed the judicial decision issued in Case No. KAC-91-0543 by Superior Court Judge Angel F. Rossy.

Respondent, Asociación de Empleados de Casino de Puerto Rico, objects all references and misstatements of facts drafted on Condado Plaza Hotel & Casino's "statement of the case" in which it appears to represent as facts of the case, that Villalba made libelous or defamatory accusations against Petitioner or against Andrews, President of William Hospitality Management Corporation. Villálba statements are reproduced in the award and they speak for themselves. (See, Appendix to the Petition p. 19-43).

We further object to references made in said "statement of the case" to issues brought forth regarding the Petitioner's request regarding the disqualification of the arbitrator. Those issues were the subject of the Superior Court Judgment entered in case CE-91-690. The Supreme

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[3] Prior to this, on two separate occasions, September 18, 1986 and October 24, 1986 the Petitioner moved the United States District Court for the District of Puerto Rico to stay proceedings before the arbitrator and in both instances the petitions were denied.

Court of Puerto Rico denied reconsideration on February 24, 1992 and no timely Petition was filed on that case before this Court. In view of this fact all references made to the issues brought forth in that case should be disregarded and not made part of the record of the case at bar.

REASONS WHY THE WRIT SHOULD BE DENIED

The Petition Presents no Important Questions of Law Which Warrant the Issuance of the Writ, but Rather Addresses Mere Factual Disputes Devoid of any Genuine Constitutional Dimension

Petitioners have attempted to frame the questions raised in its petition in constitutional terms, in order to provide the basis for the issuance of the writ of certiorari. The Petition, however, presents no constitutional issues but rather addresses various factual disputes arising within the context of a grievance arbitration process and subsequent judicial decisions affirming the arbitrator's award.

The argument in the Petition can be reduced to three claims:

a) a claim that the Award "fails to draw its essence from the collective bargaining agreement";

b) a claim that "false, defamatory statements were made" by an employee and as such are not constitutionally protected;

c) a claim that under the facts of this case Villalba could justifiably be discharged as a "disloyal employee".

The respondent will address each of the above claims separately.

A. The Issue of the Award and the Collective Bargaining Agreement

It is well settled in the federal judicial forum, ever since 1960 in the *Steelworkers Trilogy cases (United Steelworkers of America v. American Manufacturing Corp.*, 363 U.S. 504 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960)), that the refusal of the courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes through arbitration would be undermined if courts had the final say on the merits of the award. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, supra.

When the parties in an employer-employee relationship have chosen collective bargaining in order to find solutions to the disputes that may arise between them, the courts should abstain from interfering in such relationship except by way of exception under certain special circumstances, it has been stated that the federal labor policy as expressed in the labor legislation approved by Congress is to encourage the use of the arbitration process in order to obtain prompt and final solutions to the labor disputes that might otherwise end in labor strikes. See *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, supra.

As expressed by this Court in *United Steelworkers of America v. American Mfg. Co.*, supra, at page 566:

> "Section 203(d) of the Labor Management Relations Act, 1947 61 Stat. 154, 29 U.S.C. Sec. 173(d), 29 U.S.C.A., Sec. 173(d) states: 'Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . . ' That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."

Furthermore, this Court in *Enterprise Wheel & Car Corp.*, supra, stated.

> " . . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." (supra, p. 599).

The Court, in very precise and strict terms adheres firmly to the view that as long as an arbitrator is "arguably" construing the contract and acting within the scope of his authority, even if the reviewing court is convinced he committed "serious error", that does not constitute sufficient grounds for reversal, *Paperworkers v. MISCO, Inc.* 484 US 29, 37 (1987). In its ruling the Court held:

> "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, *it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear*

claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's on the contract. The arbitrator may not ignore the plain language of the contract; *but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. Enterprise Wheel,* supra, at 699. *So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect.* If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined. Furthermore, it must be remembered that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that supplementary rules of the plant are established. As the court has said, the arbitrator's award settling a dispute with respect to the interpretation of application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. *But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." MISCO,* supra, at page 37.

In the instant case Petitioner seeks that this Court grant a petition for certiorari requesting the setting aside

of a Puerto Rico Supreme Court Judgment which affirmed a judgment issued by a Superior Court confirming an arbitration award. Petitioner, in a rather multi-pronged approach, tries to bring forward several reasons to propose why the award should be vacated.

Petitioner's contentions colored in constitutional dimensions, are bound for failure as this Court has very vigorously established the standard that the federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of an arbitration award. That is precisely the situation at hand. Petitioner presented its case *at sixteen (16)*[4] arbitration hearings, it didn't prevail before the arbitrator; sought Review to the Superior Court, it didn't prevail, finally it appealed to the Supreme Court of Puerto Rico were it again didn't prevail. Petitioner's position is to relitigate *all the issues* it lost in the three forums below.[5] In their decisions the courts below were upholding the well established principle that in labor arbitration, matters of contract interpretation and view of the facts are typically proper for the arbitrator not for a reviewing court. While the arbitrator's award must draw its essence from the collective bargaining agreement, it need not mirror a judge's notion of how the agreement's language might best be interpreted or might most fairly be applied to a given set of facts. So long as the arbitrator, acting withinthe scope of his delegated authority, is arguably

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[4] Seventeen additional hearings were held over the jurisdictional and disqualification issues.

[5] Not to mention its attempts to stay proceedings at the federal courts.

construing the contract based on evidence he granted credibility, his decision must stand. To put it succinctly, a court should uphold an award that depends on a arbitrator's interpretation of a collective bargaining if it can find, within the four corners of the agreement, any plausible basis for that interpretation. In the same manner it must uphold the arbitrator's interpretation of the facts presented before him if there is evidence on the record to uphold them.

Petitioner alleges in its brief that the award should have been vacated by the courts below since the determinations of facts were not substantiated by the totality of the record. Again Petitioner tries to collaterally appeal case CE-91-690 which was dismissed by this Court for lack of jurisdiction. In its Brief, it again argues that the arbitrator's and court's findings of fact on the issues of *arbitrability, disqualifications,* and constitutional rights are not supported by the ample, clear evidence on the record as a whole. (emphasis supplied). These issues were decided by the Superior and Supreme Court in case CE-91-690 and are final and binding to the parties. The alleged reliance on "non-facts" is contrary to the appreciation of the evidence by the arbitrator, the Superior Court Judge and the Judges of the Supreme Court.

Although it may be possible to quibble over various facts found by the arbitrator and judges (or implicit in their decisions), the standard of review is unrelenting: as a general proposition, an arbitrator's factual findings are not open to judicial challenge.

The discharged employee's expressions were very clear and were included, in its entirety, in the labor

award. The fact that those expressions were made at a Legislative hearing adds to the Union's position regarding its First Amendment Protection. The arbitrator, and all the judges in the lower courts were at the same position and all, specially the arbitrator, arrived at the same conclusion: no libel nor defamation were incurred by the discharged employee. Said findings are founded in reason, and in fact; they are not based on conjectures or belief on *a proven* non-fact. Petitioner's argument is a thinly disguised attempt to retry the arbitration case before this court.

Petitioner further contends that the omission in the award to references to the "proven damages" that the employee statements allegedly caused to his employer led the court to error. Obviously, after sixteen (16) arbitration hearings, the arbitrator conclusion regarding "proven" facts or facts not proven by the parties is grounded on the record. Petitioner allegations, assertions or wishes that those were "proven damages" obviously were not shared by the arbitrator. The arbitrator conclusions of fact are based on the evidence on the record as a whole, not merely on Petitioner's "evidence". One of the crucial tasks of an arbitrator is to not only receive evidence from the parties but also to weigh said evidence, including its credibility. Petitioner's position, succinctly stated, would mean that once a party presents its version regarding a controversy, that version must be believed by the arbitrator in patent disregard of its duty to weigh the validity of the proffered evidence.

At the arbitration hearings held on the merits, the arbitrator handled numerous evidenciary conflicts. The courts, as previously stated, have established the norm of

non-interference that should prevail regarding issues of fact. The arbitrator heard all the testimonies and received all the evidence. He therefore is in the best position to judge credibility. This is exactly the kind of decision that is entitled to be given great weight by courts of appeals. That the arbitrator made a credibility finding, or reached a conclusion different from that which Petitioner asserts he should have reached, is not ground for interfering with the award. This doctrine was properly upheld by the lower courts when they sustained the validity of the award in the instant case. The Petitioner fails to substantiate any erosion of the principles enunciated by this Court which doctrine governs this case. It has failed also to demonstrate that these doctrines were not properly applied by the lower courts.

B. The Allegations Concerning Alleged Defamation

As a second error – Petitioner alleges that the employee's expression were false and defamatory statements and therefore not constitutionally protected. Petitioner insists that the employee "committed perjury, a felony "; that his statements "were not true"; and that allegedly, since they caused damages to petitioner's economic position, they were defamatory.

In a well reasoned award the arbitrator did not consider Villalba's appearance before the legislature to be libelous or defamatory:

> "In our opinion, such statements from the complainant respond to the purpose for which he was summoned before the Committee, that is, to

> propitiate a re-evaluation of the Tourist Industry ' . . . with the aim of seeing which legislative measures or administrative measures could be adopted' . . . "We understand, then, that the same represent ideas that fall within the area of the permissible and desirable in a field where alternate possibilities of public policy are discussed. We cannot, therefore, classify such a point of view as defamatory or libelous. To so classify it would constitute an unnecessary impediment to the complainant's freedom of speech and to the lawmakers' right to become informed of alternatives of the development of an industry which is of fundamental importance in the creation of jobs. Regarding this we should mention that the Puerto Rico Political Code in Section 153, provides that a witness shall commit a misdemeanor by failing to appear or refusing to respond after being summoned to give testimony of produce documents or both, in any matter under investigation before the Legislative Assembly of before a joint committee or of either of the Houses." (See Appendix to Petition, at pages 37-38).

The Petitioner again seeks review of the evidence and the facts. The arbitrator gave total consideration to the record as a whole. This Court, since its land mark decision of *MISCO*, supra, embraced totally the finality doctrine and the lower courts have since followed the principle. But even under the plethora of pre-*MISCO* decisional law establishing the boundaries within which errors of facts were a basis to vacate, Petitioner's claim lacks merits. The arbitrator's decision was not "so palpably faulty that no judge or group of judges, could even conceivably have made such a ruling" (*Safeway Stores v.*

Bakery & Confectionery Workers Local III, 390 F.2d 79 (1968)), on the contrary, not only a Superior Judge gave validity to the arbitrator reasoning and award but also the Supreme Court Judges of the Commonwealth of Puerto Rico.

As a disappointed party, Petitioner seeks continued review by this Court, as it did before the other forums. Not satisfied with the results of the lengthy hearings held before the arbitrator, and the subsequent judicial rulings which sustained the arbitrator's decision, Petitioner asks this Court for a fourth review of the evidence and the facts, contrary to the rules long established on such matter: "We do not grant a certiorari to review evidence and discuss specific facts". *United States v. Johnson*, 268 U.S. 220, 227 (1925).

C. The "disloyal employee" Claim

Again relating to the evidence, the Petitioner contends that Villalba's actions and statements were disloyal to his employer and that under prevalent labor law the employer could discharge him. The arbitrator made an extensive analysis of those statements and he concluded that the employee's actions were not disloyal. Specifically the arbitrator's words were as follows:

> "The fact that the complainant made the recommendation on public policy, or in general terms, prevents us from categorizing them as disloyal in the restrictive and usual sense of that concept (public denunciations about an employer's service or product, coarse or of doubtful quality, etc.). On the other hand, to think of the recommendations with respect to the governmental

> policy applicable to the industry in general as disloyal would constitute a limitation, not only as to the complainant's freedom of speech as a union leader and a citizen, but to the legislature's right to be informed from one whom it deems capable of doing so. With regard to the latter, read Honorable Representative Rivera Morales's statements during the questioning session once the complainant had ended his talk." (See, Appendix to the Petition at p. 39-40).

The fact that Villalba disagreed with his employer as to what the government policy should be in the Tourist industry and the Casinos, cannot be characterized as disloyal nor defamatory. Disagreement is not a synonym of disloyalty, specially when freedom of speech rights and an employee's work are at stake.

Finally, Petitioner's argument that the award is contrary to Puerto Rico's Dismissal Law, Act 80 of May 30, 1976, as amended, 29 P.R.L.A. sec. 185 et seq., is without merit. In the first place Petitioner's argument is based on the premise that Villalba incurred in libel or defamation of his employees or its business.

Act 80 of May 30, 1976, as amended, states that in cases ruled by the so called "employment at will" labor doctrine, an isolated act, if serious enough, is sufficient cause for a discharge. In the instant case, the parties deferred to the arbitrator the determination of the validity of the employer action of discharging Villalba. The arbitrator exonerated the employee of committing a serious fault, thus Petitioner's argument falls under its own weight. To give validity to Act 80 dispositions the employer must first establish, by evidence believed by

the arbitrator, the commission of the serious fault. As has been shown this is not the case. Furthermore, Law 80 as amended, seems to set the type of local "minimum employment standard" found enforceable in *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 757 (1985):

> "When a state law established a minimum employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the act." *Metropolitan,* supra, at 757.

A collective bargaining agreement may enhance, but not diminish, minimum standards prescribed by state labor law. In this case the parties deferred to the arbitrator the determination of the validity of Villalba's discharge. By doing so the arbitrator's decision, as long as he abides by the collective bargaining agreement and the submission agreement, is final and binding to the parties.

As noted above, there is simply no constitutional dimensions to the claims Petitioner raises regarding the nullity of the arbitration Award. The Petitioner had more than one day in court, and it lost. It's cursory allegations of constitutional issues cannot hide the fact that it merely wants to obtain a fourth review of a particular contextual situation, on a matter of significance only to the parties involved.

CONCLUSION

For all the above, the Petition for writ of certiorari should be denied. The Petition presents no issue which merits the granting of the writ.

Respectfully submitted.

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